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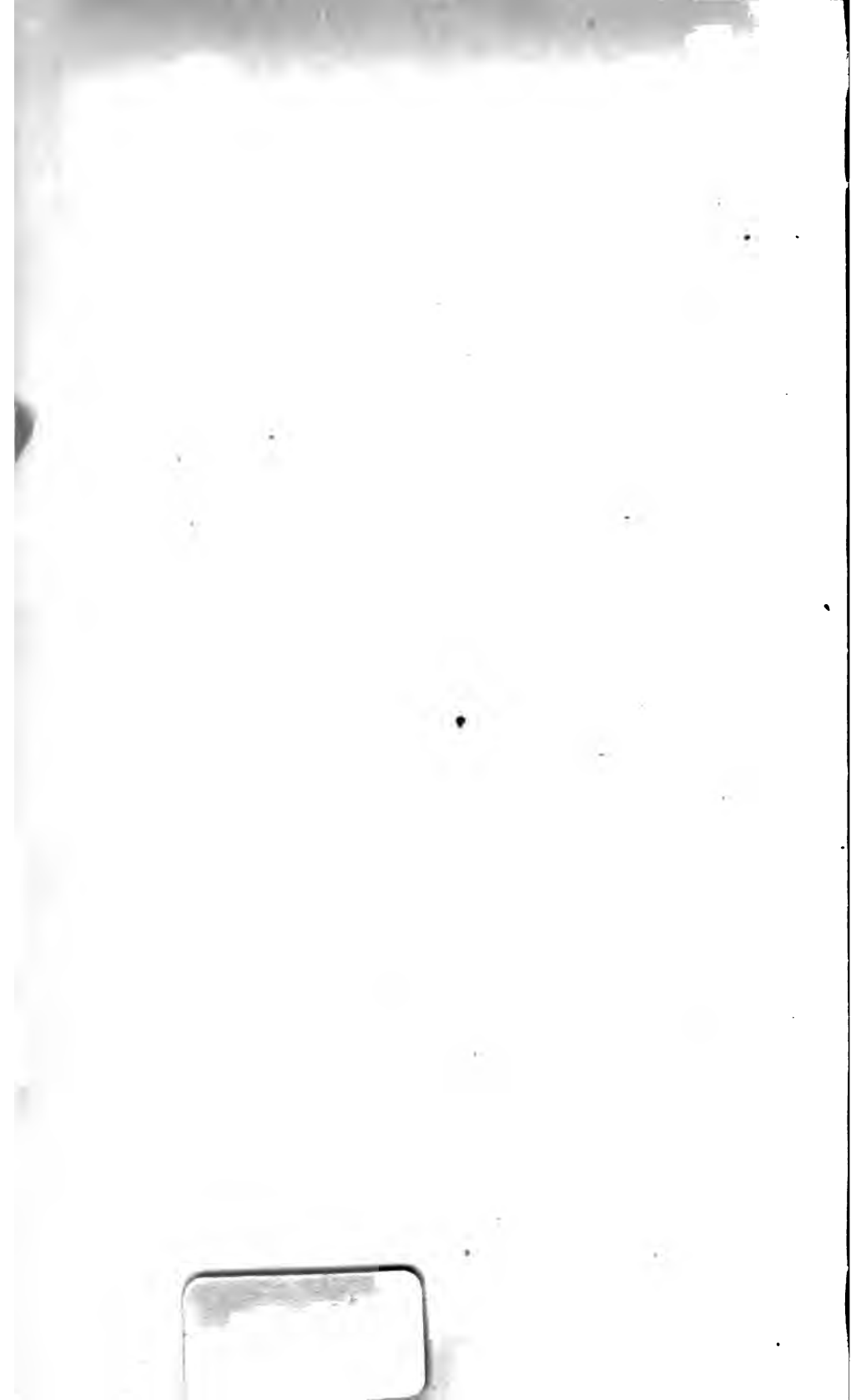
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RAILROAD REPORTS

(Vol. 58 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XXXV.

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RAILROAD REPORTS

HARRIS *et al.* v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Oklahoma, July 13, 1909.)

[103 Pac. Rep. 758.]

Trial—Motion to Direct Verdict.—The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such action is leveled.

Negligence—Question for Jury.—In cases involving the question of negligence, the rule is now settled that, when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.

Railroads—Injuries to Animals on Track—Duty of Trainmen.*—It is not enough for the engineer and fireman in charge of a railway locomotive and train to use diligence merely in driving animals away that are discovered upon the track; they should keep a vigilant lookout, and exercise ordinary diligence to frighten away animals that may be discovered approaching, or in dangerous proximity to the track, by sounding the whistle, ringing the bell, and using the means provided for that purpose.

(Syllabus by the Court.)

*For the authorities in this series on the subject of the duty to maintain lookouts on trains for the purpose of preventing collisions with live stock, see second paragraph of foot-note of *McDonnell v. Minneapolis, etc., Ry. Co.* (N. Dak.), 31 R. R. R. 471, 54 Am. & Eng. R. Cas., N. S., 471.

For the authorities in this series on the subject of the duties of those in charge of trains upon seeing stock near track, see foot-note of *Wallace v. Oregon Short Line R. Co.* (Idaho), 32 R. R. R. 712, 55 Am. & Eng. R. Cas., N. S., 712.

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Error from District Court, Wagoner County; John H. King, Judge.

Action by William H. Harris and another against the Missouri, Kansas & Texas Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Robert F. Blair, for plaintiffs in error.

Clifford L. Jackson, W. R. Allen, and Leon B. Fant, for defendant in error.

DUNN, J. On April 7, 1906, plaintiffs in error, who were plaintiffs below, filed their complaint in the United States Court for the Western District of the Indian Territory at Wagoner, wherein they alleged that on the 2d day of February, 1906, the defendant, its agents, servants, and employees, while running a freight train south over the track of its road into and through the town of Gibson Station, negligently failed to ring the bell or blow the whistle of its engine, or to slow the train down while passing through said town, carelessly and negligently collided with a mule belonging to plaintiffs, which mule had strayed on the track of defendant's railway, and this without any negligence of plaintiffs, thereby crippling the said mule, which its agents subsequently killed, and prayed for judgment for its value. To this complaint the defendant filed an answer, denying the averment of plaintiffs' complaint, and denying any liability under and by virtue of the things set forth therein. The trial of the cause was had on January 31, 1908, in the district court of Wagoner county, to a jury. On the conclusion of the evidence offered by the respective parties the court on motion directed the jury to return a verdict for the defendant, which was accordingly done. From the judgment rendered thereon dismissing plaintiffs' action the cause was appealed to this court by proceedings in error.

Counsel for plaintiffs take the position in this court that the trial court erred in not submitting the cause to the jury for its determination, contending that the evidence of negligence on the part of the servants and agents of the company as shown by the record was on the question of negligence sufficient to take the case to the jury. The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting, and the court is moved to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, and totally disregarded, leaving solely the evidence for consideration which is favorable to the party against whom such ac-

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tion is leveled. *Baker v. Nichols & Shephard Co.*, 10 Okl. 685, 65 Pac. 100; 6 Encyclopædia of Pleading & Practice, p. 693; *Cooper v. Flesner et al.* (decided May term, 1909) 103 Pac. —. The foregoing states the rule generally applicable, and is the one adopted by this court. With it, then, for a test we will examine the evidence.

The record shows that the line of the defendant company's railway runs through Gibson Station on a straight and practically level track; that near this station, and on the west of said track, there is an old box car set down on the ground used for a toolhouse. The evidence further shows that on the evening of this accident the mule of plaintiffs had escaped from its inclosure, and was grazing along near the main line track, and south of the toolhouse and near to it, and about 20 feet from the main line track. The train approached from the north at a rate of speed of from 25 to 30 miles per hour, and the testimony is conflicting on the question of whether or not a whistle was sounded, the bell rung, or any other sounds of warning given as the train approached this point. In reference to the accident the plaintiffs offered the evidence of the fireman, which was taken by defendant by deposition and was then on file. He testified that the engineer first saw the mule about 25 or 30 car lengths from the engine; that it was standing on the passing track when first discovered, eating and grazing, and remained there until the train got in about two car lengths from it, when it stepped over on the main line in front of the engine, and was knocked off by the engine. A witness of plaintiffs testified that the point from where the mule started to the track was about 20 feet distant, and that the train was about 100 feet distant when the mule started to cross, and that when the mule got on the track, the train was 50 feet from it, and that it made two jumps on the track, amounting to about 20 feet before the train hit it. That the mule was 6 or 8 feet south of the toolhouse, grazing; that the toolhouse was between the train and the mule. It further appeared from the testimony that there was another mule near the place of accident, some of the testimony putting it on the same side of the track with the mule that was killed, other evidence to the effect that the track ran between the animals. It also appeared that the depot was on the east side of the track, and that the mules were south of this building, but that the same was not between them and the train, so that they could not be seen. The engineer testified that he was about 100 feet from the mule when he first discovered it; that his train was a freight train of 48 cars, and the brakes were in good condition; that the track was straight and just about level, running through clear land; that the reason he did not notice the mule was because it was behind the toolhouse; that the train was running at a rate of between 25 and 30 miles per hour, and that the signals which he gave were opening the

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cylinder cocks, ringing the bell, and sounding the whistle, but that no effort was made to stop the train; that the signals were given about 50 feet from the point of the accident; that he could not have safely stopped the train and avoided the accident; that the mule was not on the track when he first saw it. It was also shown by a witness that a party standing south of the toolhouse, looking north in the direction from which the train came, could see up the track a quarter of a mile; that the mule was about 30 yards from the toolhouse to the point where it was struck. As we have seen, the theory of counsel for plaintiffs is that the mule was not obstructed from view of the engineer by the toolhouse, the fireman testifying that the engineer saw it about 25 or 30 car lengths from the engine, and that this theory is supported by the condition of the track, it being clear and level; that when, in accordance with the testimony of the engineer, the train did not slacken its speed, and in accordance with other evidence offered by plaintiffs no signals were sounded, there then arose a condition upon which a jury could reasonably conclude that the engineer of the defendant company was negligent in neither slacking the train nor giving any signals to frighten the animal from the track. As we have observed above, only that evidence will be considered in determining the question of whether or not a cause shall be submitted or withdrawn from the consideration of the jury which is favorable to the contentions of the party against whom the action is contemplated being taken. We neither pass upon the weight of the evidence, nor upon its preponderance, nor do we say what it proves. These are things solely within the province of a jury.

As was said by Circuit Judge Caldwell, in the case of Gulf, etc., Railway v. Ellis, 54 Fed. 481, 4 C. C. A. 454, in discussing this question, where it arose in a case in which the court refused to give a peremptory instruction to the jury to find a verdict for the defendant: "If there is any evidence, direct or circumstantial, fairly tending to support the verdict, it must stand. Every presumption is in its favor, and all doubts must be resolved in its favor. This court will not weigh or balance the evidence. And in cases like the one at bar, which turn on the question whether the party exercised ordinary care or was guilty of negligence, after the usual and appropriate definitions of those terms by the court, it is in the province of the jury to say, from a consideration of the evidence, whether in the particular case ordinary care was exercised, or whether there was negligence. In other words, what is ordinary care, or what is negligence, in the particular case, is a question of fact for the jury, and not of law for the court. Railroad Co. v. Stout, 17 Wall. 657, 663, 664, 21 L. Ed. 745; Jones v. Railroad Co., 128 U. S. 443-445, 9 Sup. Ct. 118, 32 L. Ed. 478; Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485; Railroad Co. v. Foley, 53 Fed. 459, 3 C.

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C. A. 589; Pol. Torts, 386 et seq. But, in the trial of every case before a jury, there comes a time when it may be the duty of the court to decide, as a matter of law, whether there is sufficient evidence for the jury to found a verdict upon. If there is not, the practice in the federal courts is to instruct the jury to return a verdict for the defendant. *Railway Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213. But the case should not be withdrawn from the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railway Co. v. Cox*, 145 U. S. 593, 606, 12 Sup. Ct. 905, 36 L. Ed. 829. And in cases involving the question of negligence, the rule is now settled that, 'when a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court.' *Railway Co. v. Ives*, *supra*."

Counsel for defendant take the position in their brief that the animal was a trespasser, and the railway company owed no duty to it, except to use such efforts to keep from injuring it as a reasonably prudent person would use, after its danger was discovered, and that this duty would not begin until the animal started towards the track; that it did not exist while the mule was grazing upon the right of way. In this position we believe counsel are in error. Some of the cases referred to by Counsel for both parties in their briefs from the United States Court of Appeals of the Indian Territory would appear to go to the extent of supporting this claim, but the Circuit Court of Appeals of the Eighth Circuit, which was the court of last resort in such a case as this for that jurisdiction, has reversed a number of cases decided by the United States Court of Appeals of the Indian Territory, in which the question of law involved in stock-killing cases by railroads was before it. This holding would be controlling here. *Gulf, etc., Railroad Co. v. Ellis*, *supra*; *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447; *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. 347, 1 C. C. A. 286; *Eddy et al. v. Evans*, 58 Fed. 151, 7 C. C. A. 129.

In the case of *Eddy et al. v. Evans*, *supra*, Judge Caldwell in his opinion stated the law on the facts involved therein as follows: "It was the duty of the engineer to keep a careful lookout for stock on the track, and, when it was discovered, to use all reasonable means to avoid injuring it. The engineer testifies that the horses were run into about midnight; that his engine was 50 feet from the first horse when he saw it, and the testimony of other witnesses tends to show that the second horse was 65 yards further from the engine than the first; that being the distance

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between their dead bodies as they lay by the side of the track, where they were killed. The engineer testifies he applied the air brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse furthest from the engine could and would have got off the track. Whether the jury were justified in drawing the same inference as to the first horse we need not inquire, for the reason that the instruction asked applied to both horses, and it was not error to refuse it, if the case, as to either horse, should not have been taken from the jury. We have repeatedly decided that the owners of stock in the Indian Territory have a right to let them run at large, and that, when stock stray upon the railroad track, they are not trespassing." The court in the syllabus held: "The failure of a locomotive engineer to blow the whistle on discovering stock upon the track, about 80 yards ahead, is sufficient to warrant a jury in finding negligence, although it appears that the air brakes were immediately applied."

In the case of Gulf, etc., Railroad Co. v. Washington, *supra*, the court was requested by the railway company to instruct the jury as follows: "The court instructs the jury that the engineers and servants in charge of defendant's railway trains are not bound to keep a lookout for stock upon or near the defendant's railway track, and that the extent of the duties which a railroad company owes to the owner of stock upon its track and right of way is that the engineer in charge of the train shall use ordinary or reasonable care, after the stock is discovered by such engineer, to prevent injury to such stock." In discussing the law relating to the duties which the railway companies owe in cases within the scope of the instruction requested, the court said: "It is a matter of common knowledge that the Indian Territory is a grazing country, where cattle in great numbers run at large. In the Indian Territory the owners of cattle are not bound to fence them up, and the railroad company is not bound to fence them out. A railroad operated in a country where these conditions obtain, without exercising reasonable care to prevent injury to stock, would become an intolerable engine of destruction to animal life. The railroad company knows that animals are liable to be found upon its track at any place and at all times of day, and that unless reasonable care is exercised to discover them, and the same degree of care used to prevent injury to them after they are discovered, they will probably be injured or killed by the powerful engines it runs upon its road. Under these conditions it cannot be maintained that the company is not bound to use any care to discover cattle on its track. We cannot yield our assent to the doctrine that an engineer who re-

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fuses to look, or is blind or near-sighted, may run his engine over and kill domestic animals ad libitum, and without imposing any liability on his company therefor because he did not see them. It is duty of the company, under the conditions which exist in this territory, to exercise ordinary care and watchfulness to discover domestic animals upon its track, and, when they are discovered, to use reasonable efforts to avoid harming them." The doctrine announced in the above cases was the law obtaining in the Indian Territory at the time this animal was killed. The rule is neither exceptional nor novel. Some states have required by statute a duty on the part of train operators to keep a lookout for stock on, or in close proximity to, the track, but independent of the statute, it is a common-law duty that a person shall so use his property as not to unnecessarily endanger or injure another.

The Supreme Court of Alabama, speaking of the duty resting upon engineers toward animals on or near the track, in the case of *Kansas City, Memphis & Birmingham R. Co. v. Watson*, 91 Ala. 483, 8 South. 793, said: "There exists a common-law duty when an animal is discovered in close proximity to the track, under circumstances indicating danger. In such case it becomes the duty of the engineer to use the usual and proper means to frighten it away, and, failing in this, to check the speed of the train, so as to bring it under control, in order to avoid injury. Also, when the animal is not discovered because of his negligence in not keeping a proper lookout, and injury results therefrom, the company is liable as if the animal had been in fact discovered. These principles have been repeatedly and uniformly announced by this court. *E. T., V. & G. R. R. Co. v. Bayliss*, 75 Ala. 466; s. c., 77 Ala. 429, 54 Am. Rep. 69; *S. & N. Ala. R. R. Co. v. Jones*, 56 Ala. 507."

The Supreme Court of Kansas, in the case of *Missouri Pacific Railway Company v. Gedney*, 44 Kan. 329, 24 Pac. 464, 21 Am. St. Rep. 286, likewise had occasion to pass on facts similar to those in the car at bar. The company was sued by Gedney, for the value of a cow which was killed by being struck by the engine of the company. The animal, along with several others, was grazing on the highway near to the crossing of the railroad. Some were on one side of the track and some on another. Defendant's freight train, traveling at a rate of 15 miles an hour, passed along the road and over the crossing. Shortly before the train reached the crossing the cow stepped upon the track and was struck and killed. The principal question tried was whether those in charge of the train exercised due care under the circumstances to avert the injury. The jury found they did not. The court, in discussing the facts of the case, which were very similar to the ones in the case at bar, said: "It is found that they failed to keep a vigilant lookout for stock or obstructions on the track, and failed to sound the whistle or ring the bell

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when approaching the crossing, and failed to do that which was necessary in order to avoid a collision. We think there is sufficient evidence in the record to support the findings and verdict. It is true the jury found that the engineer did not discover the cow going upon the track until the engine was within 20 feet of her, and that the train was then going at the rate of 15 miles an hour, and could not have been stopped after the cow came upon the track, and before she was struck. It is also true that the engineer and fireman testify that they were vigilant in looking out along the line of the road to see if there were any objects ahead, or animals dangerously proximate to the track, and, further, that they sounded the whistle as they approached the crossing, and as soon as they saw the cow that they reversed the engine and endeavored to stop the train. The testimony of Gedney, however, is to the effect that the whistle was not sounded, nor any danger signal given, 80 rods from the crossing, nor at any time afterward before the cow was struck. There is also testimony that the ground was level near the crossing, and that there were no obstructions to prevent the engineer and fireman from seeing the cattle on the side of the track for a distance of half a mile or more, and that, although the cattle were in plain view and approaching the track, no alarm was given to drive them away from the track. If the engineer and fireman were at their posts, and kept a lookout for obstructions, and an animal not seen by them came suddenly upon the track when there was not sufficient time or opportunity to frighten her away, or where they could not by ordinary diligence avoid a collision, the company would not be liable. It is not enough, however, that they used diligence to avert the injury after they saw the cow upon the track. It was their duty to keep a lookout for objects or animals approaching or in dangerous proximity to the track, and, if the circumstances indicated that there was danger they would get upon the track, to use the means which they possessed for driving them away." In that case, like the one at bar, there was a dispute as to whether or not signals were given. Upon this the Supreme Court of Kansas held as do we: "The conflict of testimony as to the care and diligence used by the engineer and fireman in respect to keeping an outlook and in sounding an alarm, the topography of the ground near the crossing, and the proximity of the animals to the track, has been settled by the jury, and under well-worn precedents their finding and verdict upon such testimony must be held conclusive."

We submit that under these authorities, which to our minds correctly state the rule pertaining to this class of cases, while the question presented by the record is a close one, yet it is one upon which the minds of reasonable men might come to different conclusions, and this being true, the rule adopted by this court in the case of *Missouri, Kansas & Texas Railway Company v. Shepherd*, 20 Okl. 626, 95 Pac. 243, is applicable. The statement is as

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follows: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered one of law for the court."

The judgment of the trial court is accordingly reversed, and the cause remanded for a new trial.

KANE, C. J., and TURNER, WILLIAMS, and HAYES, JJ., concur.

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(Supreme Court of Minnesota, Jan. 21, 1910.)

[124 N. W. Rep. 245.]

Street Railroads—Dogs on Track—Rights of Street Car Company.*

—A street car company is not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collision with dogs. A motorman, operating a car, is entitled to act on the presumption that ordinarily a dog on a street car track will get out of the way. *Smith v. Railroad Co.*, 79 Minn. 254, 82 N. W. 577; followed and applied.

Dogs on Track.—No circumstances presented by the record in this case take it out of the ordinary rule.

(Syllabus by the Court.)

Appeal from Municipal Court of St. Paul; John W. Finehout, Judge.

Action by William J. Henry against the St. Paul City Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

W. D. Dwyer, for appellant.

Todd & Mayo, for respondent.

JAGGARD, J. Plaintiff's dog was run over and killed by defendant's car on a municipal thoroughfare. The car was running at a high rate of speed, estimated variously at from 15 to 25 miles an hour. The dog was following his master, who drove across the track a moment or two before the car passed. The street at this place was straight, clear, and wide, and there were no other vehicles or obstructions to obscure the view. The dog was on the track some distance ahead of the approaching car. Its

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to running trains or street cars against dogs, see foot-note of *El Dorado & B. Ry. Co. v. Knox* (Ark.), 32 R. R. R. 322, 55 Am. & Eng. R. Cas., N. S., 322.

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attention was diverted by another dog. The car struck the dog and passed on. The record shows that the motorman set the air brakes on the car when he saw the dog, but did not succeed in stopping the car. The trial court found for the plaintiff in the sum of \$50. This appeal was taken from the order of the trial court denying defendant's motion for a new trial.

It is the settled law generally and in this jurisdiction that a street car company is not required to stop its cars, when running at a legal or reasonable rate of speed, to avoid collision with dogs; that ordinarily dogs may be presumed to take care of themselves; and that the motorman operating the car may act on such presumption. *Smith v. St. P. C. R. R. Co.*, 79 Minn. 254, 82 N. W. 577. It is true that when dogs are apparently oblivious to an approaching car, as when engaged in fighting upon street railway tracks, the motorman upon discovering them in a position of peril, is required to exercise reasonable care, by using proper signals or checking the speed of his car, to avoid their injury. *Harper v. Railroad Co.*, 99 Minn. 253, 109 N. W. 227, 6 L. R. A. (N. S.) 911, 116 Am. St. Rep. 415. But where, as here, there appears to be no reason why a motorman, who sees a dog running along a track towards an approaching car, is not justified in supposing that the dog would take care of itself and get out of the way, he has a right to presume, even with respect to human beings, that they will act as men usually do and avoid collision with an approaching car; yet as to them the duty of taking care is strict. Their ability to move quickly, moreover, does not approximate that of a dog. " * * * A dog * * * can be waked out of deep sleep by a cart wheel touching his flank, and can spring away unharmed before that wheel comes on." It does not appear that defendant's car was going so rapidly that this alone constituted negligence on its part. It owed no duty under the circumstances here presented to regulate its speed according to the presence or absence of a dog running towards it. Under the circumstances, plaintiff has failed to show actionable negligence on the part of defendant company.

Reversed.

COVINGTON & C. R., TRANSFER & BRIDGE CO. *v.* MULVEY'S ADM'R.

(Court of Appeals of Kentucky, Nov. 4, 1909.)

[122 S. W. Rep. 129.]

Railroads—Injury to Person Near Track—Coal Falling from Car—Negligence.*—The probability that a boy, who with a few other boys plays on the private premises of a railroad company, adjoining its right of way, will be in a position to be struck by a lump of coal falling from a passing car is not so great as to impose on the company the duty of loading its cars with reference to his presence, or of inspecting its cars to see that he is not injured by falling coal; and there is no liability for injury so occurring, in the absence of wantonness and recklessness.

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by John Mulvey's Administrator against the Covington & Cincinnati Railroad, Transfer & Bridge Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Galvin & Galvin, for appellant.

Arthur C. Hall and *J. A. Shackelford*, for appellee.

CLAY, C. John Mulvey, as administrator of John Mulvey, Jr., deceased, instituted this action against the Louisville & Nashville Railroad Company, the Chesapeake & Ohio Railway Company, and appellant, the Covington & Cincinnati Railroad, Transfer & Bridge Company, to recover damages for the death of his decedent. Upon the conclusion of the testimony the court gave a peremptory instruction in favor of the Louisville & Nashville Railroad Company and the Chesapeake & Ohio Railway Company. Judgment was entered in their favor, and from that judgment there is no appeal. The case as to appellant was submitted to the jury, which returned a verdict in favor of appellee for the sum of \$2,500. From that judgment this appeal is prosecuted. The failure of the trial court to award it a peremptory instruction is the only ground for reversal urged by appellant.

The facts are as follows: Appellant is the owner of a bridge which spans the Ohio river at Covington, Ky. It also owns and maintains railroad tracks running from Seventeenth street,

*For the authorities in this series on the subject of the care due trespassing children, see *International & G. N. R. Co. v. Vallejo* (Tex.), 32 R. R. R. 102, 55 Am. & Eng. R. Cas., N. S., 102; last footnote of *O'Bannion's Adm'r v. Southern Ry.* (Ky.), 30 R. R. R. 416, 53 Am. & Eng. R. Cas., N. S., 416; first footnote of *Wheeling & L. E. R. Co. v. Harvey* (Ohio), 29 R. R. R. 218, 52 Am. & Eng. R. Cas., N. S., 218.

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in Covington, through said city and over said bridge to points in Cincinnati, Ohio. It has locomotives which it uses for the purpose of transporting trains over the bridge and roads owned by it. At Fifth and Johnson streets in Covington, Ky., there is a vacant and uninclosed lot, which has a frontage of about 50 feet on the south side of Fifth street, and a depth of about 100 feet. This lot is bounded on the west by a stone wall or approach to said bridge, and on the east by an alley. The top of the wall is about 10 feet above its base or the level of the lot. There are two tracks on this wall; the east track being used by trains going north, and the west track by those going south. The lot in question is owned by appellant. In the summer time it has been used as a playground for children. At times they would gather up coal on the tracks and from cars, and make a fire on the lot. On December 11, 1907, about 7:30 o'clock p. m., and after dark, the decedent, John Mulvey, who was then about 12 years of age, in company with several other boys the same age, was playing on the lot referred to. Early in the day they had built a fire on the lot within a distance of 4 or 5 feet from the bridge wall. On the occasion of the accident they were sitting around the fire when they heard a train approaching from the south. This train consisted of about 20 cars, four of which were loaded with coal. As the engine approached, the boys all ran back 30 or 40 feet to escape the cinders and ashes from the engine. Shortly after the engine passed, young Mulvey ran back to the fire and took a seat thereby. In a short time one of his companions called the attention of the other boys to the fact that Mulvey was lying on the ground. About that time one of the boys saw a dark object rolling along the ground about three or four feet from young Mulvey's head. The witness who testified to this fact made a statement inconsistent with it, but on the trial of the case insisted that he had seen something rolling along the ground at the time Mulvey was injured. When their attention was called to young Mulvey, the boys rushed to his assistance. It was found that he had a wound in the top of his head. This wound contained particles of dirt. Mulvey's companions carried him to his home. It was found by the physician summoned to attend him, and by the coroner at the inquest, that young Mulvey's neck was broken. The lump of coal which it is claimed fell from the car, and which was seen rolling when young Mulvey was injured, was picked up by one of the boys, and later turned over to the coroner as evidence. There is also evidence to the effect that there was no other coal on the lot at the time of the injury. Some of the witnesses also testified that the coal in the coal cars was heaped up in the center of the cars. Appellant proved title to the lot, and also showed that the cars containing the coal were loaded at least 250 miles from the point where the accident occurred.

In discussing this case we may admit that there is some evi-

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dence tending to show that young Mulvey was killed by being struck on the head by a lump of coal which fell from one of the cars as the train passed by. The doctrine of the Turntable Cases, of course, has no application to this case. This is not a case where a dangerous agency that was alluring and attractive to children was left in such position that they could and would use it. Nor is it a case where the premises were rendered unsafe by a spring gun or any trap that would injure a person if he came in contact with it. Appellee, however, insists that, as children had been playing upon the lot in question for a long time, with the knowledge or acquiescence of appellant, it was the duty of the latter to anticipate their presence, and so load its cars as not to injure any one of them. This court has gone to the extent of holding that where a railroad track runs through a populous community, along or across streets, where from the nature of things persons may be reasonably expected at any time, it is the duty of those in charge of the train to have it under reasonable control, to keep a lookout for persons using the track, and to give timely warning of the approach of the train. *Illinois Central R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352. The reason for this rule is that the long and continued use of the track at the point in question by large numbers of persons is sufficient to indicate a reasonable certainty that persons will be found there. This rule has never been extended to cases where there was no customary use of the track at the point of the injury. The presence of persons on the track because of its customary use by the public being reasonably certain, there is a strong probability of some one's being injured unless proper precautions are taken to prevent accidents. The necessity for precaution is due to the fact that the very movement of a train is dangerous, and likely to injure those caught unawares. But the probability that a boy, who with a few other boys plays upon the private premises of a railroad company, adjoining its right of way, will be in position to be struck by a lump of coal falling from a passing car is not so great as to impose upon the company the duty of loading its cars with reference to his presence, or of inspecting its cars to see that he is not injured by falling coal. Under such circumstances there is no liability, unless the injury is wanton or reckless. There is no evidence in this case to show either one of these prerequisites to a recovery. The death of the decedent was simply the result of an unfortunate accident, which could not have been reasonably anticipated by appellant. We, therefore, conclude that the court erred in failing to give a peremptory instruction in favor of appellant.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

ARROW LUMBER & SHINGLE CO. v. UNION PAC. R. CO.

(Supreme Court of Washington, June 22, 1909.)

[102 Pac. Rep. 650.]

Railroads—Foreign Corporations—Service of Process—Agents.*—

The mere fact that a person was known and advertised as the "general agent" of a foreign railroad company did not make him an agent of the company upon whom process might be served within Ballinger's Ann. Codes & St. § 4875 (Pierce's Code, §§ 332, 333), where the company had no interest in the office in which he was, or control over it, and his salary was paid by other companies, and all freight and passenger contracts issued by them.

Railroads—Foreign Corporations—Service of Process—Agents.*—

The fact that a person solicited freight and passenger business, routing it over the connecting line of a foreign railroad company, as he did over all other lines connecting with the companies by whom he was employed, did not make him an agent of the former company on whom process might be served within Ballinger's Ann. Codes & St. § 4875 (Pierce's Code, §§ 332, 333), where all contracts were issued as the contracts of one or the other of the latter companies to whom he alone reported, and they, in turn, arranged the division of the charges made with the connecting lines upon an agreed basis.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Arrow Lumber & Shingle Company against the Union Pacific Railroad Company. From an order quashing the service of summons, plaintiff appeals. Affirmed.

Douglas, Lane & Douglas, for appellant.

W. W. Cotton, Arthur C. Spencer, and John P. Hartman, for respondent.

MORRIS, J. The plaintiff below brought this action to recover damages for the improper storage of lumber at Lincoln, Neb. Service was made upon E. E. Ellis at Seattle. The defendant moved to quash the service upon the grounds (1) that the summons was not served upon any agent of the defendant company within the state of Washington; (2) that Ellis was not an agent of defendant; (3) that defendant was a foreign corporation, not doing business within the state of Washington, nor had it com-

*For the authorities in this series on the questions, where actions against railroad companies may be brought, and upon whom, in such actions summons may be served, see last foot-note of *Slaughter v. Canadian Pac. Ry. Co.* (Minn.), 33 R. R. R. 79, 56 Am. & Eng. R. Cas., N. S., 79; second foot-note of *Dunn v. Meek* (U. S.), 31 R. R. R. 532, 54 Am. & Eng. R. Cas., N. S., 532.

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plied with the laws of this state governing foreign corporations doing business within this state. Issue being joined upon this motion, a large number of affidavits were presented to the court, resulting in the sustaining of the motion, from which ruling plaintiff appeals.

The salient facts shown by the affidavits are that Ellis is in charge of an office at Seattle, from which advertising matter of the respondent is distributed, and freight and passenger business solicited. Upon the door of this office is the following: "Union Ticket Office, E. E. Ellis, Gen. Agt." And upon the window appears the advertising design of the respondent, a shield in red, white, and blue, with the words: "Union Pacific, the Overland Route." Underneath this shield appears the following: "Oregon Railroad & Navigation Co.; Oregon Short Line R. R.; Union Pacific R. R.; Southern Pacific Co." And below are the words: "Freight and Ticket Office." Ellis also uses stationery bearing the names of the above companies, with "E. E. Ellis, General Agent," printed thereon. Several officers of the above-named railway companies made affidavits showing that Ellis was the agent of the Oregon Railroad & Navigation Company and Southern Pacific Company; that respondent company had no interest in the Seattle office or any control over it; that Ellis' salary was paid in whole by the Oregon Railroad & Navigation Company and Southern Pacific; that all freight contracts and tickets were issued by the Oregon Railroad & Navigation Company or Southern Pacific; that no contracts were made on behalf of respondent company; that the tickets sold contained coupons reading over any road east and frequently over the Union Pacific, but that all money collected for tickets was remitted to either the Oregon Railroad & Navigation Company or the Southern Pacific; that respondent was a Utah corporation, neither owning nor operating any railway line within the state of Washington; that Ellis quoted freight and passenger rates and routings over respondent's line as well as other lines connecting with the Oregon Railroad & Navigation Company and the Southern Pacific.

The statute under which the service was made is as follows: "The summons shall be served by delivering a copy thereof * * * (4) If against a railroad corporation, to any station, freight, ticket, or other agent thereof within this state; * * * (9) If the suit be against a foreign corporation or non-resident joint-stock company or association doing business within this state, to any agent, cashier, or secretary thereof. * * *" Ballinger's Ann. Codes & St. § 4875 (Pierce's Code, §§ 332, 333). A like question was determined by this court in *Rich v. C., B. & Q. R. Co.*, 34 Wash. 14, 74 Pac. 1008. That case is determinative of this, and we care to add but little to what was there said. The mere fact that Ellis was known and advertised as "General Agent" of the respondent is of no value to appellant, since it is

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clear from all the authorities that it is the actual relation of the parties that is controlling, and not the official designation or title, which the alleged agent may assume. The person upon whom the service is made must be an agent who represents, and derives his authority from, the corporation defendant, and the authority thus conferred and exercised must be an actual authority, and not one created by implication. The fact that Ellis solicited freight and passenger business routing this business over the respondent's line, as he did over all other lines connecting with the Oregon Railroad & Navigation Company and the Southern Pacific Company, does not make him an agent of the company over whose line such freight may be carried or such passengers travel, since it appears that all such contracts are issued as the contract of one or the other of the companies last named to whom he alone reports, and that they, in turn, arrange the division of the transportation with the connecting lines upon an agreed basis. Such an arrangement does not constitute a "doing business within this state," nor does it clothe Ellis with any cloak of agency within the meaning of our statute. In view of the Rich Case, we do not care to extend this opinion other than to say that, since the announcement of the rule in that case, the Supreme Court of the United States in two cases have announced a like rule. *Peterson v. C., R. I. & P. Ry. Co.*, 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841; *Green v. C., B. & Q.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. Upon the facts the Peterson Case is much stronger in favor of appellant's contention than the case before us from the fact that two of the parties served were employees of the company sought to be held.

The judgment is affirmed.

RUDKIN, C. J., and CHADWICK, FULLERTON, and GOSE, JJ., concur.

ILLINOIS CENTRAL RAILROAD COMPANY OF THE STATE OF ILLINOIS, Plff. in Err. v. ROBERT W. SHEEGOG, Administrator of the Estate of John E. Sheegog, Deceased.

Argued December 1, 2, 1909, Decided December 20, 1909.

[30 Sup. Ct. Rep. 101.]

Removal of Causes—Fraudulent Joinder—Sufficiency of Petition.—Allegations in the removal petition that the lessor railway company and the conductor of the train were fraudulently joined as party defendants solely for the purpose of preventing a removal to a Federal circuit court for diverse citizenship, of an action commenced in a Kentucky court, against the nonresident railway company exclusively operating the road, to recover for the death of an engineer, caused by the alleged negligent operation of the train and the defective condition of the road, are not sufficient to entitle the petitioner to the removal of the cause, where, in Kentucky, the facts alleged and proved against the lessee railway company in the state court made its lessor jointly liable as a matter of law.

In error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Union County, in that state, in favor of plaintiff in an action for the negligent killing of a railway employee, in which a removal of the cause to a Federal court was refused. Affirmed.

See same case below, 126 Ky. 252, 103 S. W. 323.

The facts are stated in the opinion.

Messrs. *Edmund F. Trabuc, John C. Doolan, Attila Cox, Jr., Blewett Lee, and H. D. Allen*, for plaintiff in error.

Messrs. *John G. Miller, John K. Hendrick, and P. B. Miller*, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is a writ of error to reverse a judgment rendered by the court of appeals of Kentucky in favor of the defendant in error, notwithstanding a petition and bond for removal to the circuit court of the United States. 126 Ky. 252, 103 S. W. 323.

The defendant in error brought this action for causing the death of his intestate, John E. Sheegog, by the throwing off the track of a railroad train upon which the deceased was employed as an engineer. The defendants were the conductor of the train, the Illinois Central Railroad Company, which was operating the railroad and owned the train, and the Chicago, St. Louis, & New Orleans Railroad Company, which owned the road and tracks where the accident happened, but which had let the same to the first-mentioned road. It was alleged that through the negligence of both companies the roadbed, track, etc., were in an improper condition; that through the negligence of the Illinois Central the

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engine and cars were in an improper condition; and that the death was due to these causes acting jointly, the negligence of the Illinois Central in permitting its engine, cars, and road to be operated while in such condition, and the negligence of the conductor in ordering and directing the management of the train.

In due season the Illinois Central Railroad Company, being an Illinois corporation, filed its petition to remove. The difficulty in its way was that the other two defendants were citizens and residents of Kentucky, to which state the plaintiff also belonged. To meet this the petition alleged that the plaintiff had joined these parties as defendants solely for the purpose of preventing the removal. It admitted the lease, and averred that the Illinois Central Company operated the road exclusively, and alone employed the deceased. It went on to allege that the charge of the joint negligence against the lessor and lessee in causing the wreck, as stated, was made only for the above purpose, and was fraudulent and knowingly false. The question is whether these allegations were sufficient to entitle the petitioner to have its suit tried in the Federal court. It may be mentioned here that the jury found for the other two defendants and against the Illinois Central Railroad Company, but that fact has no bearing upon the case. *Whitcomb v. Smithson*, 175 U. S. 635, 637, 44 L. Ed. 303, 304, 20 Sup. Ct. Rep. 248.

Of course, if it appears that the joinder was fraudulent, as alleged, it will not be allowed to prevent the removal. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 51 L. Ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757. And further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fail to be considered in the state courts. *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 244, 33 L. Ed. 144, 145, 9 Sup. Ct. Rep. 692; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. Ed. 765, 29 Sup. Ct. Rep. 430. On the other hand, the mere epithet "fraudulent" in a petition does not end the matter. In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tort feorsors jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. Ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. Ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could

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not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false.

We assume, for the purposes of what we have to say, that the allegations concerning the lessor state merely a conclusion of law from the acts and omissions charged against its lessee. Or, if they be taken to be allegations of fact, we assume, again merely for the purposes of decision, that they are effectively traversed by the petition to remove. The Kentucky court of appeals appears to us to have discussed the case on this footing. Whether it did or not, the question whether a joint liability of lessor and lessee would arise from acts and omissions of the Illinois Central Railroad Company alone was a question of Kentucky law for it to decide, and it appears to us to have decided it.

We should observe in the first place that the cause of action alleged is not helped, but rather hindered, by the allegation that the deceased was an employee of the Illinois Central Road. The case did not stand on the breach of any duty owed peculiarly to employees, and, on the other hand, was encumbered with the fact that a part of the negligence charged was that of a fellow servant. The plaintiff recovered for a breach of a duty to the public which at best was not released or limited by his intestate's having been in the company's service. Now, whether we agree with it or not, the doctrine is familiar that, in the absence of statute, a railroad company cannot get rid of the liabilities attached to the exercise of its franchise by making a lease. Whatever may be the law as to purely contract relations, to some extent, at least, the duties of the lessor to the public, including that part of the public that travels on the railroad, are held to remain unchanged. In this case the court of appeals, after noting that it does not appear that the lessor was relieved by statute, quotes an earlier Kentucky decision which seemingly adopted the following language of a commentator: "If it be true, as the decision with substantial unanimity admit, that the lessor railway remains liable for the discharge of its duties to the public unless expressly exempted therefrom by statute, it seems difficult to conceive its absence of liability in any event, except, perhaps, where the plaintiff is suing upon an express contract made with him by the lessee corporation." *McCabe v. Maysville & B. S. R. Co.*, 112 Ky. 861, 875, 66 S. W. 1054.

The court, however, then goes on to refer to a distinction taken in a later Kentucky case between torts arising from negligent operation and those resulting from the omission of such duties as the proper construction and maintenance of the road (*Swice v. Maysville & B. S. R. Co.*, 116 Ky. 253, 75 S. W. 278), and quotes, with seeming approval, decisions in other states, limiting the liability of the lessor to the latter class. But it then proceeds to show that the recovery in this case is upon a breach of a duty to the public, and that, according to the declaration and the verdict, the injury

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was due, in part, at least, to the defective condition of the road. It ends by saying: "The appellee not only had reasonable grounds to believe that the resident corporation was responsible to him, but he had actual grounds to believe it." We understand the words "actual grounds" to mean that the belief was correct on the allegations and findings according to Kentucky law. So that, whatever may be the precise line drawn by that court hereafter, it stands decided that in Kentucky the facts alleged and proved against the Illinois Central Railroad in this case made its lessor jointly liable as matter of law. This decision we are bound to respect.

It follows, if our interpretation of the decision is correct, that no allegations were necessary concerning the Chicago, St. Louis, & New Orleans Railroad Company except that it owned and had let the road to its codefendant. The joint liability arising from the fault of the Illinois Central Road gave the plaintiff an absolute option to sue both if he preferred, and no motive could make his choice a fraud. The only way in which fraud could be made out would be by establishing that the allegation of a cause of action against the Illinois Central Railroad was fraudulent, or, at least, any part of it for which its lessor possibly could be held. But it seems to us that to allow that to be done on such a petition as is before us would be going too far in an effort to counteract evasions of Federal jurisdiction. We have assumed, for purposes of decision, that the railroad held on what may be called a secondary ground is to be charged, if at all, only as a consequence of the liability of its lessee. But when we come to the principal and necessary defendant, a man is not to be prevented from trying his case before that tribunal that has sole jurisdiction, if his declaration is true, by a mere allegation that it is fraudulent and false. The jury alone can determine that issue, unless something more appears than a naked denial. *Louisville & N. R. Co. v. Wangelin*, 132 U. S. 599, 603, 33 L. Ed. 474, 476, 10 Sup. Ct. Rep. 203; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 138, 45 L. Ed. 121, 124, 21 Sup. Ct. Rep. 67. However, the petition for removal hardly raises this point. For it directs itself wholly against the allegations of joint negligence, and does not attempt to anticipate the trial on the merits so far as the conduct of the Illinois Central is concerned.

Judgment affirmed.

MEYERS v. SAN PEDRO, L. A. & S. L. R. CO.

(Supreme Court of Utah, Aug. 23, 1909.)

[104 Pac. Rep. 736.]

Master and Servant—Injury to Servant—Negligence—Evidence.—

Where, in an action for the death of the conductor in charge of the first section of a train in a rear-end collision with the second section, the evidence showed that the collision occurred a little over a mile before reaching a switch at a station which consisted of only a switch track and a water tank; that the first section at the time of the accident was running at about seven miles an hour because of a defect in the locomotive; that the second section, which had overtaken the first section at a station about 20 miles from the place of the accident, was running from 20 to 30 miles an hour—a rule of the railroad that trains will approach yard limits under full control and be prepared to stop within the limits of vision, etc., was admissible as bearing on the care of the respective crews, especially that of the crew of the second section in approaching the station.

Evidence—Best Evidence.—In an action for the death of the conductor in charge of the first section of a train by the second section running into it, the testimony of the conductor of the second section as to when his train was due at a station a little over a mile beyond the place of the accident was admissible as against the objection that the time-table was the best evidence, for the fact to be proved as to when the second section was due at the station was an independent fact.

Evidence—Declarations of Agents—Proof of Agency.—Proof of custom of a railroad to give a service letter to discharged employees, that the superintendent of a division gave a service letter to a conductor discharged after a collision between his train and another train on that division, that the report of an investigation by the trainmaster as to the cause of the collision had been transmitted to the superintendent, without proof as to whose duty it was to give such a letter, and without showing the scope of the authority of the person whose duty it was to write it, did not establish the agency of the superintendent so as to render the letter admissible as having been written within the scope of his authority.

Evidence—Admissions—Admissibility.—The admissions of a party are admissible, regardless whether the transaction as to which they are made is itself material to the issue and admissible in evidence.

Evidence—Admissions—Declarations of Agents—Admissibility.—In the absence of some direct or specific authority of an agent to make an admission to bind the principal by a particular admission of the agent within an alleged apparent scope of authority, the transaction in which the agent was acting for the principal and in respect to which the admission was made, and to which it related, must itself be material and admissible.

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Evidence—Declarations—Res Gestæ.—The admission of a declaration as a part of the *res gestæ* rests on the principle that the declaration is interwoven with the transaction of which it is a part, and is the spontaneous expression of thoughts created by and springing out of the transaction, and the declaration in such a case is admissible for or against either party, regardless of the relation of agency.

Evidence—Declarations—Res Gestæ.*—A statement by a division railroad superintendent to a discharged conductor, made nine days after the discharge by the trainmaster who discharged the conductor on the day his train collided with another train, as to the cause of the collision, and contained in a service letter given by him to the conductor, is merely a part of the *res gestæ* of the giving by the superintendent to the conductor of a service letter pursuant to the custom of the railroad, and is inadmissible to bind the railroad in an action for death caused by the collision, in the absence of evidence of the authority of the superintendent to make the statement.

Appeal and Error—Harmless Error—Evidence—Admissibility.—Where, in an action for the death of a railroad conductor in charge of the first section of a train caused by the second section running into it, the evidence was conflicting on material issues, the error in admitting a statement by a division superintendent to the conductor in charge of the second division to the effect that the conductor had been discharged for running down a train which was on time, and that he was dismissed from the service because of his utter disregard of the timetable rules and instructions, was prejudicial.

Master and Servant—"Fellow Servants"—Who Are.*—Where two sections of a train are operated as two distinct and independent trains, the members of the crew of one section are not fellow servants of the members of the crew of the other section within the statute defining fellow servants as persons engaged in the service of a common employer, working together at the same place and time, and to a common purpose.

Appeal from District Court, Third District; T. D. Lewis, Judge.

Action by Lena Meyers against the San Pedro, Los Angeles & Salt Lake Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

*For the authorities in this series on the question whether the members of one train crew are fellow servants of another train crew, see first foot-note of *Still v. San Francisco & N. W. Ry. Co. (Cal.)*, 31 R. R. R. 680, 54 Am. & Eng. R. Cas., N. S., 680.

For the authorities in this series on the different department limitation of the fellow servant rule, see fourth foot-note of *Indianapolis T. & T. Co. v. Kinney (Ind.)*, 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264; last foot-note of *Louisville & N. R. Co. v. Clark (Ky.)*, 29 R. R. R. 595, 52 Am. & Eng. R. Cas., N. S., 595; last foot-note of *Louisville & N. R. Co. v. Brown (Ky.)*, 27 R. R. R. 426, 50 Am. & Eng. R. Cas., N. S., 426.

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Pennel Cherrington, for appellant.

Booth, Lee & Badger and *Powers & Marionaux*, for respondent.

STRAUP, C. J. The plaintiff brought this action to recover damages for the death of her husband, alleged to have been caused by the defendant's negligence.

It is alleged in the complaint that the defendant negligently ran and operated "a certain train known as 'section No. 2,' of train No. 81 at a high and dangerous rate of speed into and against a certain train known as the 'first section' of train No. 81, and in disregard of the schedule which it had theretofore established for the running of trains," whereby the deceased, who was the conductor of the first section, was killed. The defendant denied the alleged negligence, and pleaded contributory negligence and negligence of fellow servants. Two sections were made up at Black Rock, Utah. W. C. Guernsey was the conductor of the second section. The crews of both sections received orders from the train dispatcher to leave Black Rock and run to Caliente, Nev. The first section left at about 9:55 p. m. of the 4th day of February. The second section left about 30 or 40 minutes later. No further orders were received from the dispatcher by either crew. The collision occurred about $1\frac{1}{4}$ miles east of the east switch at or near Beryl, Utah, on February 5th, at about 4:25 a. m., as testified to by some witnesses, or at 4:30 or between 4:28 and 4:29, as testified to by others. The station there consisted of only a switch track and a water tank. The distance between the east and west switch is 3,000 feet. Freight train No. 81 was scheduled on the time card to leave Beryl at 4:30 a. m. The last stopping place was at Lund, about 20 miles east of Beryl. The second section at Lund overtook the first section. The first section left Lund at 3:55 a. m., about 20 minutes late. The second section left about 17 or 20 minutes thereafter. The speed of the first section running from Lund to Beryl was from 15 to 20 miles an hour until within about $2\frac{1}{2}$ miles of the place of the accident, when it slowed down to about 5 or 7 miles an hour, at which speed it was running when the rear end was run into by the second section with such force as to demolish the caboose and three cars ahead of it, and to derail a number of other cars. The engine of the second section, and about 10 cars of that section, were also derailed, and a couple of them crushed. The second section, after it left Lund, made an average speed of from 27 to 28 miles an hour. When it struck the rear of the first section, it was running 30 miles an hour as testified to by the conductor of the second section, or about 20 miles an hour, as testified to by the engineer of that section. The deceased and two brakemen of the first section, who were in the caboose, were killed. The first section had not intended to stop at Beryl. The second section had intended to do so "to water an outfit."

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It is further shown that at the time of the accident one of the injectors on the engine of the first section—an apparatus which automatically fed water from the tank into the boiler—gave the engineer some trouble, and had bothered him for the last 8 or 10 miles, and had given him more or less trouble during the trip. The engineer of that section testified that he was working on the injector at the time of the accident, and because it did not work properly the steam was shut off, which reduced the speed of the train. The morning was very dark and foggy. The first section displayed the usual tail lights on the rear of the caboose. The average speed of the train in the vicinity of the accident, as shown by the time card, would be 10.7 miles per hour, and over the entire division 13.5 miles. A number of rules of the defendant were put in evidence, some by the plaintiff, others by the defendant. Among them were the following: Rule 91: "Trains in the same direction must keep at least five minutes apart, except in closing up at stations or at meeting and passing points." Rule 92: "A train must not arrive at a station in advance of its schedule time. A train must not leave a station in advance of its leaving time." Rule 98a: "Stations having yard limit will be designated in special rule in time-table. All trains and engines will have the right to work within such yard limits regardless of all except first-class trains, but will give way as soon as possible upon their approach. All except first-class trains will approach yard limits under full control and be prepared to stop within the limits of vision. The responsibility for accident at such points will rest with the approaching train. At such stations as have no yard limit signs, the limits will be considered to be between extreme switches." Rule 9: "The speed of passenger trains will ordinarily be that prescribed in the schedule, but in case of delay, requiring a greater speed in order to enable trains to make meeting points or to secure connections, the speed may be so moderately increased above that prescribed in the schedule as in the judgment of the conductor and engineman in charge of the train may be safe and prudent, due consideration being always given to conditions of track and all the circumstances. Freight trains will not exceed a speed of 30 miles per hour, i. e., will consume not less than two minutes in running each and every mile." Rule 99: "When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When required, he may return to his train, first placing two torpedoes on the rail when the conditions require it. The front of a train must be protected in the same way when necessary by the fireman." Some witnesses testified that when a first section of a train left a station 20 minutes late, and the second section left 17 or 20 minutes thereafter, it was the custom of railroad companies to require the conductor and crew of the first section to

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protect the forward train, in the nighttime and when necessary, by throwing off fusees until it got back on schedule time. Most of the witnesses who so testified also testified that the throwing off of fusees was largely within the judgment and discretion of the conductor. Other witnesses testified that it was not the custom, under such circumstances, to throw off fusees or otherwise protect the train in that manner, unless it was not making reasonable headway, or had stopped, or was about to be stopped. The engineer of the second section testified that at Lund he was flagged by a fusee, and that from the time he left Lund until the accident he "did not run on to any burning fusees, nor did my engine explode any torpedoes." He further testified that, "immediately before hitting the train, I knew that we were about a mile and a quarter, or maybe two miles, from Beryl. I was on the lookout. I saw the tail lights of first 81 about five car lengths ahead of me. I then set the air in emergency." The case was tried to the court and a jury. A verdict was rendered in favor of the plaintiff. The defendant appeals.

The first assignment of error relates to the ruling of the court in admitting in evidence rule 98a. The objection made to its admissibility was that it was immaterial and irrelevant. We think the rule was relevant and material as bearing on the care and conduct of the respective crews, especially that of the second section in approaching Beryl.

The conductor of the second section, a witness on behalf of the plaintiff, was asked: "When were you due at Beryl?" The question was objected to on the ground that "it is incompetent and not the best evidence; that the time-table in evidence is the best evidence." The objection was overruled, and the witness answered that "it depended on how late the first section is. The second section had to be five minutes behind the first section; and, if the first section was on time, the second section was due at 4:35 a. m." We think no error was committed in the ruling. The fact to be proved—when was the train due at Beryl—was not the contents of a writing, but an independent fact to which the writing (the printed time-table) was merely collateral, or of which it was merely an incident. Furthermore, neither the plaintiff nor the deceased was a party to the writing, nor did the plaintiff assert any right founded upon or growing out of it, nor had either any connection with the instrument, in the sense that the writing was regarded or understood to be the sole repository of the fact. "The question was not what was the contents of this printed paper; but when should the cars have arrived at that point?" C., B. & Q. R. R. v. George, 19 Ill. 510, 71 Am. Dec. 239.

The trainmaster of the defendant, a witness called in behalf of the plaintiff, was permitted to testify, over the defendant's objection, that the defendant made, and that the witness held, an investigation of the accident; that he had power to employ and

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discharge men; that it was his duty to make an investigation and to report findings to the superintendent; that he was subpoenaed to bring with him the report of the investigation, and that he did not produce it because it had been transmitted to the superintendent. When this evidence was offered, it was stated by plaintiff's counsel that they "desired to show an admission made by the company with regard to this accident after having full knowledge of it." Guernsey, the conductor of the second section, testified that he was discharged on the day of the accident, and that on the 14th day of February a "service letter" was issued and delivered to him by the division superintendent, and that he lost the letter. Notice was given to the defendant to produce a copy of it. In response to the request, the defendant brought into court a letter book entitled "service letters from Aug. 1903, to ———," containing copies of service letters, including the one issued and delivered to Guernsey. Guernsey testified that, when an employee voluntarily or otherwise left the service of the railroad company, he was given a service letter which he could use or not as he pleased in seeking employment with other railroad companies. The plaintiff, after identifying the copy contained in the letter book so produced by the defendant, offered the copy in evidence. The material parts of the letter are: "San Pedro, Los Angeles & Salt Lake Railroad Company, Salt Lake Division. Employee's Service Certificate. Salt Lake City, February 14th, 1906. This is to certify that Willard C. Guernsey has been in the service of this company as follows: Conductor * * * from second month, second day, 1905, to second month, fifth day, 1906. Cause of leaving, discharged. * * * Specify conduct and cause of leaving: Discharged while on train 2nd No. 81, February 5th, 1906; ran down train 1st No. 81, which was on time, causing rear end collision. Dismissed from the service on account of his utter disregard of the time-table, rules and instructions." The letter was signed by "H. E. Van Housen, Superintendent." On the upper left-hand corner was stamped, "S. P., L. A. & S. L. R. R., Salt Lake Division, February 14th, 1906. Office of Superintendent, Salt Lake City, Utah." It was shown that H. E. Van Housen, the person who issued and signed the letter, was the superintendent of the division in which the accident occurred. The admission of the letter in evidence was objected to on the ground that it was immaterial, incompetent, and hearsay; that it contained a mere narrative of past events, was not a part of the *res gesta*, and was only the conclusion of the person writing it. The objection was overruled and the copy admitted in evidence. Complaint is made of this ruling. The respondent seeks to uphold the ruling on the doctrine that the principal is bound by the authorized admission of his agent. In this respect it is contended: (1) That the relation of agency between the defendant and the writer of the letter was undisputed; (2) that the admission of

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statement in the letter pertained to a matter within the scope of the agent's authority; and (3) that the admission constituted a part of the *res gestæ* of a transaction in which the agent was acting for his principal. That Van Housen was the division superintendent, and that some sort of agency existed between him and the defendant, was clearly established. That the statement or admission, however, was made within the scope of the agent's authority is not so clear. It is not claimed that any direct or special authority was shown. The proof upon the subject is that, when an employee left the service of the railroad company, it was the custom of the company to give him a so-called service letter; that the person who signed and gave the letter in question was the superintendent of the division in which the accident occurred; that a report of an investigation by the trainmaster had been transmitted to him; and that a copy of the letter was produced by the defendant in response to a notice. There is no direct proof to show whose duty it was to write or give such a letter, nor what was the scope of the authority of the person whose duty it was to write it. From the mere fact that the letter was written and signed by the superintendent it may not be presumed that it was within the scope of his authority to write such a letter as was here written by him, or that he was otherwise authorized to make such an admission. Though it may be said that the giving of service letters to employees who were discharged from or who had left the defendant's service was within the apparent scope of the superintendent's authority, and that the letter given by him was given in the discharge of duties to be performed by him, yet we are of the opinion that the letter was improperly admitted in evidence, for the reason that the transaction with respect to which the alleged admission was made and related was itself immaterial and inadmissible. The statements contained in the service letter, of course, were not *res gestæ* of any transaction connected with or related to the accident, nor of the transaction of Guernsey's discharge. Guernsey was discharged, not by the superintendent, but by the trainmaster, the day of the accident or the day after. Nine days after that time the superintendent gave Guernsey the service letter. The statements made by the superintendent in the letter were not made by him while he was in the performance or in the discharge of any duties which related to the discharge of Guernsey, nor of any duties which related to any of the transactions of the accident or which were in any wise connected therewith; nor were they made while he was acting for the principal with respect to the matters and things recited in the letter. When the statements were made, he was not then engaged in the performance of duties, nor in the conduct of business, which related to the transactions characterized by the statements. In other words, the statements of the agent were not contemporaneous with the transactions characterized by them, but

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were as to such transactions mere narratives of past events. The transaction with respect to which the superintendent made the statements, and of which they were *res gesta*, was the giving of a service letter to Guernsey. That transaction was not material to any issue in the case, and was itself inadmissible in evidence. Whether Guernsey was or was not entitled to a service letter, or the character and contents of the letter to which he was entitled, were matters wholly immaterial to the issue. If the transaction with respect to which the statement or admission of the agent is a part, the transaction which the agent was conducting for the principal and in respect of which the statement or admission was made is itself immaterial and inadmissible, then the statement or admission of the agent is not in law the admission of the principal and admissible for such purpose, unless special authority for making the admission is shown. To that extent the admissibility of an admission of the principal himself, and that of his agent, stands on a different footing. The principal's own admission may, of course, be received in evidence, regardless of the question whether the transaction with respect to which it is made was itself material to the issue and admissible in evidence. But to bind the principal by a particular admission of his agent made not by special or direct authority, but within an alleged apparent scope of authority, the transaction in which the agent was acting for the principal and in respect of which the statement or admission of the agent was made and to which it related must itself be material and admissible. This principle is readily deducible from the authorities which generally hold that "the admission or declaration must constitute a part of the *res gesta* of a transaction in which the agent was acting for his principal, and serve to characterize that transaction." Huffcut on Agency (2d Ed.) § 138; Mechem on Agency, § 714. And so are the authorities generally. Such has been the holding of this court. *Moyle v. Congregational Society*, 16 Utah, 69, 50 Pac. 806; *Idaho Co. v. Insurance Co.*, 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586. In the first case, while the question was correctly decided, yet the expression in the opinion that "the declaration, however, must be voluntary and spontaneous, and so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as virtually to constitute but one entire transaction, and to preclude the idea of design, afterthought, or a mere narrative of a past transaction," and be, in some particulars, inapt, when applied to the question there involved.

The rules of evidence permitting the immediate and spontaneous declarations and acts of persons to be received in evidence as an exception to the hearsay rule, when they are a part of the *res gesta* of a transaction itself admissible in evidence, and permitting declarations and acts of the agent to be received in evi-

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dence as the declarations or acts of the principal himself, "involve two distinct and unrelated principles." Wigmore, Ev. § 1078. But in either case, to render the declaration or act admissible, it must be a part of the *res gestæ* of a transaction itself admissible in evidence. In the one case the admission of the declarations or acts rests on the principle that they are intimately interwoven with the transaction of which they are a part, and that they are the spontaneous expression of thoughts or acts created by and springing out of such transaction. The declarations in such case are admissible in evidence for or against either party, regardless of the relation of agency. In such case it is proper enough to say that the declarations "must be voluntary and spontaneous," and "so as to preclude the idea of design, etc. In the other the admission rests upon the principle of agency and the authority of the agent in the particular instance to speak for the principal. But, in the absence of some direct or special authority to make the admission, the law does not charge the principle with the declarations or admissions of the agent, unless the "declarations or statements are made during the transaction of business by the agent for the principal, and in relation to such business and while within the scope of the agency; in other words, unless the representations may be deemed a part of the *res gestæ*." And, "since the declarations of the agent are not admissible unless they constitute a part of the *res gestæ*," and "cannot be received unless they are contemporaneous with the acts which they illustrate and of which they form a part" (Jones, Ev. [2d Ed.] § 255), it necessarily follows that, if the transaction of which they are a part is itself immaterial and inadmissible, the declarations themselves are likewise inadmissible. We think the court erred in the ruling. We are also of the opinion that the error was prejudicial.

The contents of the letter, the alleged admission, bore directly upon two issues: One in respect of the care or negligence of the crew of the second section, especially that of Guernsey, the conductor of that crew; the other, the care or negligence of the deceased and members of his crew. That Guernsey and his crew upon the evidence adduced independently of the admission were guilty of negligence in the running and operation of their train is not open too much, if any, controversy. The evidence showing that the second section was run in violation of rules 91 and 98a, and of the time-table, and as stated by the superintendent in the service letter, is substantially without conflict. But it is recited in the letter that Guernsey "ran down train 1st No. 81, which was on time, causing rear-end collision." The statement that the first section "was on time" is, upon the evidence, open to some controversy. It is conceded that no time was fixed for the arrival of the first section at Beryl. The time for its departure was fixed at 4:30 a. m. The collision occurred about 1¼ miles east of the east switch. If the collision occurred at

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4:25 a. m., as testified to by the engineer of the first section, and the time when the deceased's watch stopped, it may be said that the first section was on time, as stated by the superintendent, when the collision occurred. If, however, the collision occurred at 4:30, as testified to by the engineer of the second section, then the first section was not on time, for it was then at least a mile and a quarter east of Beryl. Nor, when it is considered that the yard limit of such a station as Beryl was "between extreme switches," as stated in rule 98a, and that the accident happened one mile and a quarter east of the east switch, can it conclusively be said that the first section was within the yard limits, or had reached Beryl, when the collision occurred. It having been shown that when one train followed another and was required to "keep at least five minutes apart," by the testimony of some of the witnesses that it was the custom "of a conductor in charge of the first section of the train when behind time to protect against the rear section with fusees when necessary, or torpedoes, or otherwise," and by others that it was not the custom to do so unless the first section was "not making reasonable headway, nor standing still, nor expected to be stopped," the question whether the first section was on time was material. Since the evidence on such question was conflicting, we cannot say that the jury was not influenced by the statement of the superintendent in reaching a verdict, which, as rendered, necessarily implied a finding that the deceased was not guilty of contributory negligence. If, for instance, it should have been argued to the jury that the first section was behind time and because of such fact, and of the injector on the engine not working properly thereby requiring the steam to be shut off and the speed of the train reduced to five or seven miles an hour, the deceased, in view of all the circumstances, ought to have protected his train by throwing off fusees, and was negligent because he did not do so, such a position would have been somewhat inconsistent with the statements of the superintendent, which, having been received in evidence as the defendant's admission, were powerful weapons, not only to convict Guernsey of negligence, but also to exonerate the deceased of the charge of contributory negligence. To hold that the ruling was not prejudicial requires a holding that the evidence without conflict not only shows that Guernsey was negligent, but also that the deceased was not at fault. To so hold leads to the conclusion that the plaintiff was entitled to a directed verdict on the question of the defendant's liability. We are not prepared to say that the plaintiff on the undisputed evidence was entitled to recover as matter of law.

It is further contended that the court erred in charging the jury that the deceased and the train crew of the second section, including Guernsey, were not fellow servants. The statute defining who are, and who are not, fellow servants, is as follows: "All

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persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in other departments of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants." It is made to appear that the two sections of the train were run and operated as two distinct and independent trains, and that the defendant regarded and treated them as being subject to the rules applicable to the running and operation of separate trains. The question then arises: Are the members of train crews of separate trains fellow servants within the meaning of the statute? We think they are not. They are not in such case "working together at the same time and place and to a common purpose." Such has been the holding of the courts of Texas, the state from which the Utah statute was borrowed. *Patterson v. Houston & T. C. R. Co.* (Tex. Civ. App.) 40 S. W. 442; *Missouri, K. & T. Ry. Co. v. Hines* (Tex. Civ. App.) 40 S. W. 152; *Texas & N. O. R. Co. v. Echols*, 17 Tex. Civ. App. 677, 41 S. W. 488; *Missouri, K. & T. Ry. v. Whitlock*, 16 Tex. Civ. App. 176, 41 S. W. 407; *Gulf, C. & S. F. Ry. Co. v. Warner*, 89 Tex. 475, 35 S. W. 364; *Masterson v. Galveston, etc., Ry. Co.* (Tex. Civ. App.) 42 S. W. 1001; *Long v. Chicago, R. I. & T. Ry. Co.*, 94 Tex. 53, 57 S. W. 803. In these and other cases from that court it is, in effect, held that under the statute, to be fellow servants, the two servants must have a present corresponding relation with the labor or duty then being performed, and that they must be directly co-operating with each other in the accomplishment of an immediate end or purpose as distinguished from a remote or ulterior end or purpose. It can here be said, as was said by the court in the case of *Texas & N. O. R. Co. v. Echols*, *supra*: "While the grade of employment may be said to have been the same, they were not working together at the same time and place, nor to a common purpose. The purpose contemplated by the statute is of an immediate, and not ulterior, purpose. It might as well be said that the train crew in charge of the train that carried the ties and placed them on the spur track were working to a common purpose with the crew that unloaded and stacked them for the purpose of having them treated with creosote, as that appellee's crew were fellow servants of the dinkey-track crew; and in the same manner might it be reasoned that the men who cut the timber were working to a common purpose with the track layers. It seems that the purpose here, within the meaning of the statute, is that of unloading and stacking the ties ready for the crew that

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took them down and unloaded them onto the dinkey trucks. But all of the conditions of the test must be met. Were they working together at the same time and place? It is true that 'at' may indicate nearness only in the point of time and place; but again the train crew furnishes an illustration. They reach nearness in point of place when they shove the loaded car onto the spur track, and may do so in point of time when the crew to unload the car take it and commence their work. Certainly these two crews would not be fellow servants. There is a distinct line drawn between the time of the work of the crew on the spur track and the dinkey crew and one almost as distinct as to place. The intent of the law is to relieve the master from liability only when the servants are brought into such contact with each other that they might see the danger and presently prevent it. They are thus made careful for each other only to the extent of acts presently done, and not those done by servants distant in point of time or place, of which they have had no opportunity to know." In the case of Gulf, C. & S. F. Ry. Co. v. Warner, *supra*, the Texas court also said: "The distinctive characteristics prescribed by the statute as essential to be found concurring and common to two or more employees in order to constitute them fellow servants are: First. 'They must be 'engaged in the common service.' As here used, 'service' means the thing or work being performed for the employer at the time of the accident, and out of which it grew, and 'common' means that which pertains equally to the employees sought to be held fellow servants, and therefore 'common service' means the particular thing or work being performed for the employer at the time of the accident, and out of which it grew, jointly, by the employees sought to be held fellow servants. The members of a crew running a train, though each be in the performance of different acts in reference thereto, are all 'engaged in the common service,' for they are jointly performing the thing or work of managing the train for the employer; but they would not be 'engaged in the common service' with the members of a crew running another train for the employer over the same road for one crew would be jointly performing the thing or work of managing one train, while the other would be jointly performing the thing or work of managing the other train." We think the construction placed upon the statute by the Texas court better reflects the legislative intent and the purpose sought to be accomplished by the statute than that which was placed upon a similar statute by the Missouri court in the case of Strottmann v. St. Louis, I. M. & S. Ry. Co., 211 Mo. 227, 109 S. W. 769, where it was held that an engineer operating a train was a fellow servant with a telegraph operator and station agent upon the theory that they were in the same grade of service and were working together at the same time and place and to a common purpose. We also think that the case of Dryburg v. Min. Co., 18 Utah, 410, 55 Pac. 367, is an authority

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to the effect that the servants of the two crews were here not fellow servants. In that case the plaintiff, a laborer, was at work on a level of a mine about 40 feet above a lower level where the offending servant was at work. Through the negligence of the servant on the lower level the support of one side of a ladder which was used in going from one level to another was removed. The plaintiff was injured in his attempt to descend the ladder. The trial court granted a nonsuit on the grounds that the plaintiff was guilty of contributory negligence, and that he and the servant whose negligence caused the ladder to be made insecure were fellow servants. On appeal Chief Justice Zane, in delivering the opinion of the court, held that the question of plaintiff's negligence ought to have been submitted to the jury, and, after defining and construing various parts of the fellow-servant statute, also held that "whether the plaintiff and Saunders (the offending servant) were 'fellow servants,' as that term should have been defined by the court in his charge, would have been a question of fact to be found by the jury from the evidence." He therefore held the ruling of the court granting a nonsuit erroneous, reversed the judgment, and remanded the case for a new trial. Mr. Justice Barch dissented. Mr. Justice Miner in concurring said: "I concur with the Chief Justice in that part of the opinion holding that the question of contributory negligence of the plaintiff, under the testimony, should have been submitted to the jury, and that the order granting a nonsuit was erroneous. I do not concur in the rule as to the construction of the statute with reference to fellow servants as presented in the opinion. I am of the opinion that the judgment should be reversed for the reason given, and a new trial granted."

It is said that, while it may be difficult to ascertain the point on which Chief Justice Zane and Mr. Justice Miner agreed to reverse the judgment and remand the case, yet it is clear that they did not agree on the construction placed upon the statute by the Chief Justice. *Lukic v. So. Pac. Co.*, 160 Fed. 135. It is manifest that they agreed in the holding that the question of plaintiff's negligence was one of fact. It is also clear that Mr. Justice Miner did not agree with what was said by the Chief Justice in defining and construing the statute. But it is just as evident that he did agree with him on the conclusion reached, that, under the statute, and upon the facts appearing in evidence, the plaintiff and the offending servant were not fellow servants, or, at least, that the question was one of fact for the jury. Such a holding and conclusion were necessarily inherent in his concurrence in the judgment of reversal. While they did not agree upon the meaning to be given the provisions of the statute drawn in question, and the construction to be placed upon them, yet, by the reversal of the judgment of the court below, concurred in by both of them, they necessarily agreed that, in the light of the statute, and upon the facts made to

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appear, the two servants were not fellow servants as matter of law. To that extent the case is an authority on the question here involved. So is the case of *Jenkins v. Mining Co.*, 24 Utah, 513, 68 Pac. 845, where it was held by a unanimous court that a servant whose duty it was to manage and operate a cage by which miners were conveyed in and out of the mine was not, under the statute, a fellow servant with a miner, nor was a miner a fellow servant with a tool carrier whose duty it was to take sharpened tools into the mine and throw them off at various levels and bring up the dull ones. It was there held that the miner and the cage manager and the miner and the tool carrier were not working together at the same time and place and to a common purpose within the meaning of the statute. Whatever difficulty there may be in ascertaining what was decided in the Dryburg Case, there ought not to be any difficulty in ascertaining what was decided in the Jenkins Case. In *Neesley v. So. Pac.*, 35 Utah, —, 99 Pac. 1067, it was recently held by us that a railroad engineer operating a train was not a fellow servant with a telegraph operator nor with a section foreman nor with sectionmen. While it was there held that these servants were not in the same grade of service, yet it was also held, in effect, that they were not working together at the same time and place and to a common purpose.

We think no error was committed in the charge complained of, nor in other rulings involving the question of fellow service.

For the reasons heretofore given, the judgment of the court below is reversed, and the case remanded for a new trial. Costs to appellant.

WELCH v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 7, 1910.)

[90 N. E. Rep. 521.]

Railroads—Operation—Injuries to Licensee—Contributory Negligence—Question for Jury.—Where there was evidence that decedent, on request of the conductor of a train to remove certain skids from behind a standing car, stepped on the car to go across to them, it was a question for the jury whether he was negligent, so as to bar recovery for injuries caused by the sudden starting of the car on an order of the conductor

Master and Servant—Injuries to Servant—Fellow Servants—Nature of Relation.*—Where a conductor of a train told decedent, a servant of another company, to remove certain skids, if this was recognized and obeyed as a command, they became fellow servants.

Master and Servant—Injuries to Servant—Fellow Servants—Question for Jury.*—Where a conductor of a train told decedent, an employee of an oil company to remove certain skids, which he proceeded to do, it was a question for the jury whether there was a temporary change of employers, so as to make decedent a fellow servant of the conductor.

Railroads—Operation—Injuries to Trespassers or Licensees—Duty of Railroad.†—Where a conductor of a train told decedent, an employee of an oil company, to remove certain skids, which he proceeded to do, if no change of employment was thereby effected, and the decedent was a trespasser or bare licensee, the railroad company owed him no duty, except to refrain from reckless and willful acts of injury.

Railroads—Operation—Injuries to Licensee—Invitation of Conductor.‡—An invitation, express or implied, to an employee of an oil company owning the premises and track where a train was standing,

*For the authorities in this series on the question whether employees of different masters may be fellow servants of each other, see foot-note of *Hamble v. Atchison*, etc., Ry. Co. (C. C. A.), 31 R. R. R. 797, 54 Am. & Eng. R. Cas., N. S., 797.

†For the authorities in this series on the subject of the care due from railroad company to volunteers performing services for it, see third foot-note of *Taylor v. Baltimore & O. R. Co.* (Va.), 31 R. R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776.

For the authorities in this series on the subject of the implied authority of railroad agents or employees to employ others to work for their employer, see second foot-note of *Taylor v. Baltimore & O. R. Co.* (Va.), 31 R. R. R. 776, 54 Am. & Eng. R. Cas., N. S., 776.

For the authorities in this series on the subject of the care due licensees or trespasser on trains or street cars, see last paragraph of last foot-note of *Clark v. Colorado & N. W. R. Co.* (C. C. A.), 32 R. R. R. 463, 55 Am. & Eng. R. Cas., N. S., 463; foot-note of *Doggett v. Chicago*, etc., Ry. Co. (Iowa), 28 R. R. R. 290, 51 Am. & Eng. R. Cas., N. S., 290.

‡For the authorities in this series on the question whether persons on trains or street cars by invitation of railroad employees are

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to go upon a car, was within the authority of a conductor placed in charge of the train by the railroad company using the track.

Railroads—Operation—Injuries to Licensee—Question for Jury.—The proper interpretation of a conductor's words in telling decedent to remove certain skids, and of his conduct in connection with all the surrounding conditions, was for the jury.

Railroads—Operation—Injuries to Licensee—Liability.†—If, in response to a conductor's invitation, one goes on a car, and is injured by the negligence of the railroad company's servants, it is liable.

Exceptions from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Margaret Welch, as next friend of James Flynn, who died since the bringing of the action, against the Boston & Maine Railroad. Action continued by plaintiff as administratrix. Verdict directed for defendant, and plaintiff excepts. Exceptions sustained.

E. M. Shanley, for plaintiff.

Archibald R. Tisdale, for defendant.

BRALEY, J. The plaintiff's intestate, James Flynn, was employed by the Standard Oil Company to weigh oil, or perform other light work as he might be directed. In the performance of his duties as weigher, he worked in a building used as a filling or shipping house, which is referred to in the exceptions as "the platform room or covered platform." In close proximity to this building, the door of which opened onto it, was a railroad track, used to run tank cars to the works where they were loaded, or unloaded, as the oil company might direct. Directly opposite to the covered platform was an open platform, upon which movable skids were placed extending across the track to the doorway of the building, affording when the track was not in use a convenient means of communication. Among other duties, the decedent usually removed and replaced the skids, whenever cars were to be run in or out of the yard. By some omission or oversight, the skids had not been removed, on the day of the accident, before a train came in made up of a shifting engine, with "about seven cars." In coming in, the train broke apart, leaving two cars connected with the engine, while the remaining cars running on a downgrade struck the skids with such force as to break and throw them behind the trucks to the ground. The evidence was conflicting, but the jury could find that the conductor, who stood on the tank car at the extreme rear, and saw the skids, upon ascertaining

trespassers or licensees, see second foot-note of *Clark v. Colorado & N. W. R. Co.* (C. C. A.), 32 R. R. R. 463, 55 Am. & Eng. R. Cas., N. S., 463.

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that they had been struck, and this part of the train stopped by the collision, and setting of the brakes on the car, called to the decedent, who was in the covered platform, "to come and pick up the skids." It appears that the platform of the tank car when the car stopped was not only opposite to the doorway, but extended its entire width, leaving a space of about five inches between the wall and the car. A finding would have been warranted that the only practicable method of quickly reaching the skids was to pass over the car to the further side of the track and the "outside" platform. It was while attempting to cross, and as he stepped on and took hold of the iron railing, that the engineer in obedience to a signal from the brakeman backed down to recouple the detached cars. The impact forced the tank car suddenly forward, causing the decedent to lose his footing. In falling, he was caught and rolled between the wall and the car, receiving severe injuries. The evidence of the conductor as to his conduct is inconsistent with the evidence of the other witnesses, and there was testimony that when the tank car had been stopped, and while the decedent in his presence was getting on in response to what had been said, the conductor before he had fully boarded the car, or reached a place of safety, signaled the brakeman, who obeyed the order, to couple the cars. It is manifest upon this evidence, and the inferences which could have been properly drawn, that it could not have been ruled as a matter of law, as the defendant contends, that Flynn either was negligent, or assumed the risk. The car was stationary, the conductor in control of the movements of the train was present, and the skids were behind the car on the track from whence he had been asked to remove them. When viewed in the light of common experience, and the ordinary prudence of men, the decedent would be justified in assuming that under these conditions the conductor would not deliberately give an order, the result of which, as he should have known, would cause the car to move suddenly, exposing him to the chance of being injured, without giving some caution, or warning. This question was for the jury. *Leavitt v. Leavitt*, 158 Mass. 355, 33 N. E. 527; *Mears v. Boston & Maine R. R.*, 163 Mass. 150, 39 N. E. 997; *Hartford v. N. Y., N. H. & H. R. R.*, 184 Mass. 365, 68 N. E. 835; *Hanley v. Boston Elev. Ry.*, 201 Mass. 55, 58, 87 N. E. 197, and cases cited.

But the principal contentions of the defendant are that Flynn, being either a volunteer, or mere temporary servant of the defendant, assumed any risk arising from the negligence of his fellow servants, or he was a trespasser, or at most a licensee. If the call of the conductor "to come and pick up the skids" was a command, which Flynn recognized as such and obeyed, they became fellow servants. It was, however, a question of fact, under suitable instructions, whether there was a temporary change of employers by the voluntary submission of Flynn to the control of

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the defendant. *Bowie v. Coffin Valve Co.*, 200 Mass. 571, 578, 86 N. E. 914; *Cain v. Hugh Nawn Contracting Co.*, 202 Mass. 237, 88 N. E. 842; *Berry v. New York Central & Hudson River R. R.*, 202 Mass. 197, 204, 88 N. E. 588. The jury could have said that it was only a request, or an abrupt reminder, that he had neglected his duty in not previously removing the skids. If, however, no change of employment was found to have been effected, yet if Flynn was a trespasser, or a bare licensee, using the car while performing service for the company, the defendant owed to him no duty except to refrain from reckless and willful acts of injury. *Heinlein v. Boston & Providence R. R.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676. The uncontradicted testimony of the defendant's conductor, and the foreman of the company, showed that the track was owned and kept in repair by the company, although operated by the defendant, to whom the cars and engine belonged. But if as to the employees of the company, who also were rightly there, this exclusive occupation continued until delivery had been completed, an express or implied invitation to use the car was within the authority of the conductor, who had been put in charge of the train. *Ramsden v. Boston & Albany R. R.*, 104 Mass. 117, 121, 6 Am. Rep. 200. The interpretation which should be given to his words and conduct, in connection with all the surrounding conditions, was a question of fact. It is true the conductor testified that he told him not to get on, but from the version given by the plaintiff's witnesses, which the jury were at liberty to accept, they could say he stepped on the car because of the conductor's request. In the operation of the train, if it was of advantage and benefit to the defendant that the obstruction should be speedily removed, an invitation to use the car in the emergency could be inferred, after Flynn had been asked to act. *Plummer v. Dill*, 156 Mass. 426, 427, 31 N. E. 128, 32 Am. St. Rep. 463.

If in response to the invitation, and through no fault of his own while there, he was injured by the negligence of its servants, the defendant is responsible. *Wagner v. Boston Elevated Ry.*, 188 Mass. 437, 439, 74 N. E. 919, and cases cited; *Robertson v. Boston & Northern St. Ry.*, 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314.

We are accordingly of opinion that the case should have been submitted to the jury.

Exceptions sustained.

STENVOG v. MINNESOTA TRANSFER CO.

(Supreme Court of Minnesota, June 18, 1909.)

[121 N. W. Rep. 903.]

Master and Servant—Injuries to Servant—Assumption of Risk.*—

Plaintiff, directed to assist in loading heavy rails on to a car, complained that the work had proved too heavy for him. The "master gave no heed to the complaint, but had him go on." As he was lifting one of the heavier rails, he sprained his back. It is held that plaintiff was the best judge of his own lifting capacity, and that the risk was upon him not to overtax himself.

Master and Servant—Injuries to Servant—Assumption of Risk.—As

to any assurance by the master, the case is controlled by *Manore v. Kilgore-Peteler Co.*, 120 N. W. 340.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; David F. Simpson, Judge.

Personal injury action by Olaf Stenvog against the Minnesota Transfer Company. The action was dismissed, and from an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Ludvig Arctander, for appellant.

W. H. Norris (F. W. Root, of counsel), for respondent.

JAGGARD, J. Plaintiff and appellant was engaged exclusively in trucking goods in defendant's warehouse. Defendant took plaintiff from this work, for which he was especially employed, and directed him to assist another of defendant's employees in loading heavy switch rails into a box car standing in defendant's yards. "After plaintiff had been at work for about 30 minutes,

*For the authorities in this series on the question whether railroad employees assume the risks while lifting heavy weights, see *Sherman v. Texas & W. O. R. Co.* (Tex.), 18 R. R. R. 637, 41 Am. & Eng. R. Cas., N. S., 637 (inexperienced boy ordered to lift heavy weights); *Roberts v. Indianapolis St. Ry. Co.* (Ind.), 4 R. R. R. 957, 27 Am. & Eng. R. Cas., N. S., 957 (overexertion by conductor in switching car on turntable); *Lee v. Chesapeake, etc., R. Co.* (Ky.), 6 Am. & Eng. R. Cas., N. S., 783 (carrying ties); *Southern Ry. Co. v. Manzy*, 20 Am. & Eng. R. Cas., N. S., 647 (loading cars); *Bryan v. Southern R. Co.* (N. Car.), 21 Am. & Eng. R. Cas., N. S., 542 (loading heavy timbers on cars).

For the authorities in this series on the subject of the assumption of risk by employees while doing dangerous work in obedience to orders, see last foot-note of *Lyon v. Charleston & W. C. Ry.* (S. Car.), 26 R. R. R. 443, 49 Am. & Eng. R. Cas., N. S., 443; second head-note of *Chicago, etc., Ry. Co. v. Rathneau* (Ill.), 26 R. R. R. 202, 49 Am. & Eng. R. Cas., N. S., 202; foot-note of *St. Louis, etc., R. Co. v. Mathis* (Ark.), 22 R. R. R. 538, 45 Am. & Eng. R. Cas., N. S., 538.

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he found that it became too heavy for him, and he complained to the foreman that he could not do the work, because it was too heavy for him. The foreman, however, gave no heed to his complaint, but had him go on, until, as he was lifting one of the heavier rails he sprained his back, in consequence whereof he was obliged then and there to discontinue the work at hand, and quit his job, and submit to medical treatment. These facts appeared in the complaint and in the opening statement of plaintiff's counsel to the jury. Thereupon defendant moved for a dismissal. The court granted the motion. This appeal was taken from the order denying plaintiff's motion for a new trial.

The conclusion of the learned trial judge was correct. "I think," the court said, "there is no principle of law that makes the master the guarantor of the sufficiency of a man's muscles, so that if a man is set to do work that is too hard for him to do, and in the attempt to do it he overtires himself or overuses his muscles voluntarily, he can recover." The authority fully sustains this position. In *Words v. Railway Co.*, 99 Ga. 283, 25 S. E. 646, the plaintiff was directed to lift and carry a cross-tie. He complained that the ties were too heavy for him. None the less he was directed to "tote them." In an action brought for consequent injury, it was held that the servant was bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which his employment relates, and if he fails to do this, and in consequence is injured, the injury is attributable to the risks of the employment, and the master is not liable. So in *Ferguson v. Mills*, 106 Tenn. 236, 61 S. W. 53, plaintiff was ruptured while attempting to lift a truck out of a drainage hole. It was held that he "was the best judge of his own lifting capacity, and the risk is upon him not to overtax it."

Defendant has urged the principle "that a servant is not called upon to set up his own unaided judgment against that of his superiors; and he may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own." S. & R. on Negligence, vol. 1, § 186. From this point of view the case is controlled by *Manore v. Kilgore-Peteler Co.*, 120 N. W. 340. There plaintiff complained to the master of the insufficient number of fellow servants engaged in unloading a car. There, as here, the master gave no assurance of safety, and said nothing likely to mislead plaintiff or to misrepresent the situation; and the plaintiff knew the danger and in law appreciated the risk. In this view of the case, it is unnecessary to discuss other considerations urged by plaintiff.

Affirmed.

ROSS *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois, Dec. 22, 1909. Rehearing Denied Feb. 4, 1910.)

[90 N. E. Rep. 701.]

Master and Servant—Assumption of Risk—Dangers Incident to Work.*—The usual and ordinary dangers incident to the service are assumed by the servant, including risks which arise and become known to the servant during the service, as well as those in contemplation at the time of the original hiring.

Master and Servant—Assumption of Risk—Knowledge of Danger.†—Where the foreman of a switching crew knew that the engine used was operated without a proper headlight, and he continued to work without any complaint, and without any promise to repair the same, and was killed by a collision between his engine and cars to which it was attached, and another switch engine and cars, he assumed the risk by continuing at work.

Master and Servant—Assumption of Risk—Burden of Proof.‡—Where the foreman of a switching crew is killed in an accident resulting from a defective headlight on the engine with which he was working, the burden of proof, in an action by his administratrix against the railroad company, to show that deceased did not have knowledge of the defective headlight, is upon plaintiff.

Master and Servant—Assumption of Risk—Weight and Sufficiency of Evidence.—In an action against a railroad company for the death of the foreman of a switching crew in an accident caused by a defective headlight on the engine with which deceased was working, the burden of showing that deceased did not have knowledge of the defect may be sustained by proof of circumstances from which the want of such knowledge may be reasonably and fairly inferred.

Master and Servant—Assumption of Risk—Weight and Sufficiency of Evidence.—Evidence in an action for causing the death of plain-

*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see first foot-note of *St. Louis, etc., Co. v. Jamison* (Ark.), 31 R. R. R. 677, 54 Am. & Eng. R. Cas., N. S., 677; second paragraph of first foot-note of *Laughy v. Bird & Wells Lumber Co.* (Wis.), 31 R. R. R. 242, 54 Am. & Eng. R. Cas., N. S., 242.

†See first foot-note of *Arkansas Midland Ry. Co. v. Worden* (Ark.), 32 R. R. R. 106, 55 Am. & Eng. R. Cas., N. S., 106; foot-note of *Wilson v. New York, etc., Co.* (Pa.), 31 R. R. R. 297, 54 Am. & Eng. R. Cas., N. S., 297.

‡For the authorities in this series on the subject of the burden of proving assumption of risk by a railroad employee, see second paragraph of foot-note of *Clay v. Chicago, etc., Ry. Co.* (Minn.), 29 R. R. R. 123, 52 Am. & Eng. R. Cas., N. S., 123; second head-note of *Dunbar v. Central Vermont R. Co.* (Vt.), 26 R. R. R. 413, 49 Am. & Eng. R. Cas., N. S., 413; second head-note of *Arenshield v. Chicago, etc., Ry. Co.* (Iowa), 22 R. R. R. 41, 45 Am. & Eng. R. Cas., N. S., 41.

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tiff's intestate, held to show that he had knowledge of a defective headlight on the engine with which he was working as foreman of a switching crew when he was killed, and that the court should have directed a verdict for defendant on the ground that he assumed the risk incident to such defect.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Rock Island County; Emery C. Graves, Judge.

Action by Julia A. Ross, administratrix of the estate of George Ross, against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appealed to the Appellate Court, where the judgment was affirmed, and defendant again appeals. Reversed and remanded.

See, also, 136 Ill. App. 518.

Jackson, Hurst & Stafford (E. C. Lindley, of counsel), for appellant.

Ludolph & Reynolds and *J. T. & S. R. Kenworthy*, for appellee.

VICKERS, J. Julia A. Ross, as administratrix of her son, George Ross, brought this action to recover damages from the Chicago, Rock Island & Pacific Railway Company for wrongfully and negligently causing the death of her intestate. In the trial court the plaintiff recovered a judgment for \$7,500, which has been affirmed by the Appellate Court for the Second District. The defendant has prosecuted a further appeal to this court.

The evidence, which is not conflicting, tends to establish the following facts: George Ross, the deceased, a single man, was at the time of his death about 30 years old, and was in the employ of appellant, and had been for several years prior thereto, in the capacity of foreman of the switching crew which worked with switch engine No. 156 in the yards of appellant at Rock Island. The yard in which the crew worked is a double yard, composed of two yards adjoining and parallel with each other. They covered a strip of ground extending east and west about 1,400 feet long upon the river front in the city of Rock Island, and between 200 and 300 feet wide north and south. The main track of appellant's road runs east and west through the center of these grounds. On each side of the main track is a lead track. From the south lead track switch tracks branch off at intervals to the south and west. The south switch yard is known as the Twenty-Fourth street yard, while that part of the switchyard north of the main track is known as the Twentieth street yard, and the switch tracks in this part of the yard connect with the lead track at both ends. The deceased, with his crew, worked in the Twentieth street yard with engine No. 156. Charles Ross, a brother of the deceased, was foreman of a crew that worked in the Twenty-Fourth street yard with engine No. 106. Each engine,

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while at work, usually remained in its own yard, yet occasionally they were required to cross over and do some work in the yard. The duty of the foreman of the switching crew was to hunt up cars on the various switch tracks and give direction to the switching crew what cars to move, and where to move them, and to give directions for the loading or unloading of cars, and also in regard to making up trains. A man by the name of Knight was the switchman with the crew of which the deceased was foreman. It was his duty to throw switches and couple and uncouple cars. The foreman also did some work of this character. These switching crews both worked nights. They commenced at six o'clock in the evening and worked until six o'clock in the morning. On the night of March 12, 1905, the crew of which the deceased was foreman went to the roundhouse, which is located about one mile east of the switchyard, to get the engine to commence work. While near the roundhouse the evidence shows that the front headlight of engine No. 156 burned out and broke the glass in front of the headlight so that the lamp would not burn. The foreman of the roundhouse directed that a switchman's lantern showing a white light should be hung beneath the place for the headlight on the engine, and a lantern was so placed, and the crew took the engine and proceeded to the yard. The headlight on the rear of the engine was in order. When the engine and crew reached the deceased he asked why they were so late, and was told the headlight had burned out, which caused the delay. The evidence does not show that the deceased made any examination of the engine at that time. Upon being told that the headlight had burned out he walked into the depot. The engine was used all of the night of the 12th in the yards, and the deceased was there during that night in the discharge of his duties. On the following night, March 13, engine No. 156 was again sent out from the roundhouse without a front headlight but with the lantern hanging below the broken glass in the same way that it had been used all the night before. On the night of the 13th the deceased was waiting for the engine at the Twentieth street depot and when it came up he gave the crew some instructions. At the time he gave these instructions he was standing about opposite the middle of the engine. After the orders were delivered the engine backed up, passing the deceased, and he crossed the track in front of the engine some six or eight feet from the lantern which was hanging on the glass of the headlight. The movements of the engine and crew, including the deceased, from this time until the accident are not detailed very fully by the witnesses, nor do we see that it is important that these movements should be described. About 11 o'clock on the night of the 13th, engine No. 156 had gone in on the side track for the purpose of bringing out a number of cars that were standing on this track. The deceased was on the rear end of the rear car, and was evidently intending to ride out on the

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car when the engine went out on the main yard track. While engine No. 156 was in on the siding, engine No. 106 backed a cut of freight cars down the main track, passing several switches which were closed, and when the switch track upon which engine No. 156 was standing was reached, the cars being moved by engine No. 106 went in on the open switch, resulting in a collision with engine No. 156, and the effect of the impact was to throw the deceased off the rear end of the car, and he fell upon the track and was run over, suffering injuries from which he soon afterwards died.

At the close of appellee's evidence, and again at the close of all of the evidence, appellant made a motion for a directed verdict in its favor and submitted an instruction in writing for that purpose. The motion was overruled, and the exception preserved to that ruling is the principal error complained of in this court.

The contention of appellant is, that under the undisputed facts in evidence the injury must, as a matter of law, be held to have resulted from a risk which was assumed by the deceased. The rule of law in reference to assumed risk has been often stated by this court, and the doctrine applies as well to those risks which arise and become known to the servant during the service as to those in contemplation at the time of the original hiring. 2 Cooley on Torts (3d Ed.) 1044. The usual and ordinary dangers incident to the service are assumed by the contract of hiring. One entering into an employment which is necessarily more or less dangerous is held to take those dangers into consideration in making his contract to work, and for an injury received from such dangers the servant cannot recover. There is, moreover, another class of dangers which the servant assumes, not because they were in contemplation at the time of hiring, but because the servant, having obtained knowledge of the existence of such danger after he is employed, elects to continue without complaint, or promise of his employer to remove the danger after the servant obtains such knowledge. This branch of the rule seems to rest upon a species of waiver, and is expressed by the maxim *volenti non fit injuria*. *O'Maley v. South Boston Gaslight Co.*, 158 Mass. 135, 32 N. E. 119, 47 L. R. A. 161; *Drake v. Auburn City Railway Co.*, 173 N. Y. 466, 66 N. E. 121; *Illinois Central Railroad Co. v. Fitzpatrick*, 227 Ill. 478, 81 N. E. 529, 118 Am. St. Rep. 280.

Under the law as established by the foregoing authorities, and many others that might be cited, it is clear that if the deceased knew that engine No. 156 was being operated without a proper headlight, and he continued to work with said engine without any complaint, and without any promise to repair the same, and was injured on account of said defective headlight, his so continuing in the service with such knowledge would constitute a waiver on his part of any claim for damages on account of such injury. The whole question on this branch of the case resolves

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itself into an inquiry as to whether the deceased did have knowledge that the engine was being operated without a sufficient headlight. The burden of proof to show that the deceased did not have such knowledge is upon the appellee. *Swift Co. v. Gaylord*, 229 Ill. 330, 82 N. E. 299. It was not necessary that this proof should be supplied by the direct testimony of witnesses, but it may be established by proof of circumstances from which the want of such knowledge may be reasonably and fairly inferred. The nature of the inquiry is such that it would be in most cases impossible to furnish direct proof, but the rule is well established that whatever the character of proof relied upon may be, the burden is upon the servant to show the absence of such knowledge. It therefore becomes our duty to consider the facts and circumstances in proof relating to the knowledge of the deceased as to the condition of the headlight on his engine.

First, it is to be kept in mind that the deceased was an experienced railroad man and had worked for a number of years in these switchyards. Necessarily he was very familiar with the engine and the other appliances and equipment used in the switchyard. Having worked with the engine at night, and become entirely familiar with the appearance of an engine when the headlight was burning, it is incredible that the deceased would not observe the absence of a matter so conspicuous as a headlight on the front of his engine. To our mind the probability that the deceased would take note of the absence of the headlight is much stronger than it would be in the case of a person less acquainted with engines. The evidence is undisputed that on the night before the accident the deceased was told that the headlight had burned out. He knew that the engine had been used all of the night of the 12th with a lantern in the place of a headlight. The evidence is also undisputed that on the night of the accident the deceased was near the engine, that he talked with the other members of his crew, and that he passed in front of the engine within seven or eight feet of the place where the headlight should have been, and thus had an opportunity to see that the headlight had not been repaired, and that there was only a lantern, the same as on the night before.

It is contended by the appellee that the deceased had a right to expect that the headlight would be repaired on the day of the 13th. Granting that this might have been his expectation, still what is more natural or reasonable than that he would notice to see if the headlight had, in fact, been repaired when he saw the engine on the night of the 13th? It seems to us that to hold that the deceased did not have knowledge of the defective headlight is to close our eyes to the reasonable and natural inferences to be drawn from these facts. There is nothing in this record which tends to negative the existence of knowledge of the absence of this light in the deceased. We think that, giving these circumstances

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their reasonable and ordinary probative force, there is no basis for a finding that the deceased did not know the condition of this headlight. The defect was so open and obvious and the opportunities of the deceased for observing were such that we cannot find that he did not have such knowledge without imputing to him negligence in making use of opportunities afforded which would be equivalent to actual knowledge. *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904. The deceased, knowing of the defects and continuing to work with the engine thereafter, must be held to have assumed the risk, and there can be no recovery. *Cichowicz v. International Packing Co.*, 206 Ill. 346, 68 N. E. 1083. The evidence, together with all reasonable inferences to be drawn therefrom, satisfies us that the deceased knew of the defective condition of the headlight, and that he continued in the service after he had such knowledge, from which the conclusion of law necessarily results that the court erred in refusing to direct a verdict for defendant. The judgments of the appellate and circuit courts are reversed and the cause remanded.

Reversed and remanded.

ST. LOUIS, I. M. & S. RY. CO. v. HAWKINS.

(Supreme Court of Arkansas, Jan. 4, 1909.)

[115 S. W. Rep. 175.]

Master and Servant—Assumption of Risk.*—The negligence of the master, whether direct or through a fellow servant, may be assumed.

Master and Servant—Injuries to Servant—Questions for Jury—Assumption of Risk.—The question of assumption of risk is for the jury, unless the facts are undisputed and present a situation so plain that different conclusions cannot be drawn therefrom.

Master and Servant—Injuries to Servant—Questions for Jury—Assumption of Risk.†—Where a cinder shoveler, working in a cinder pit, complained of a hostler taking engines into the pit without signals, and threatened to quit unless the required signals were given and was

*For the authorities in this series on the question whether a servant assumes risks arising from the negligence of his master or his representatives, see foot-note of *St. Louis, etc., Ry. Co. v. Harmon* (Ark.), 29 R. R. R. 104, 52 Am. & Eng. R. Cas., N. S., 104, where all those preceding it are collected.

†For the authorities in this series on the subject of assumption of risk by servant as affected by promise to repair defects or remedy other dangerous conditions, see extensive note appended to *Morgan v. Rainier Beach Lumber Co.* (Wash.), 30 R. R. R. 549, 53 Am. & Eng. R. Cas., N. S., 549; second head-note of *Pennsylvania R. Co. v. Forstall* (C. C. A.), 30 R. R. R. 1, 53 Am. & Eng. R. Cas., N. S., 1; first head-note of *Cicalese v. Lehigh Valley R. Co.* (N. J.), 29 R. R. R. 167, 52 Am. & Eng. R. Cas., N. S., 167.

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informed that his complaint had been properly lodged, he did not as a matter of law assume the risk of injury from the hostler's negligence by returning to work the next day with knowledge that the hostler was still on duty.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Elsey Hawkins against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lovick P. Miles, for appellant.

Sam R. Chew, for appellee.

HILL, C. J. Elsey Hawkins was employed by the appellant company as a cinder shoveler, working in a cinder pit in its yards in Van Buren. His testimony tended to prove: That while intent upon his work an engine was backed into the cinder pit, without the usual signals of approach, and he was injured by it. The day before this occurred he had complained to his foreman of the hostler operating this engine having taken engines into the cinder pit without signals, and threatened to quit his employment, unless the required signals were given of the approach of engines to the pit. His foreman promised to speak to his superior and that night told him he had reported it to his (the foreman's) superior, but he did know what he (the vice principal) had done about it. The next morning Hawkins returned to work, and knew that the same hostler of whom he had complained was handling engines. He was injured about 8 o'clock, after the hostler had taken three or four engines into the cinder pit.

From a judgment in plaintiff's favor the railroad company has appealed, and says that the trial court should have given a peremptory instruction for the defendant on the ground that his evidence showed that he had assumed the negligence of the company by reason of which he suffered his injury. This occurrence took place subsequent to the passage of Act March 8, 1907, charging the master with fellow servant's negligence. Unquestionably the negligence of the masters, whether committed directly or through a fellow servant, may be assumed. *C., O. & G. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837; *C., O. & G. R. Co. v. Craig*, 79 Ark. 53, 95 S. W. 168; *St. L., I. M. & Sou. R. Co. v. Mangan* (Ark.) 112 S. W. 168; *Pettus & Buford v. Kerr* (Ky.) 112 S. W. 886.

Ordinarily the question of assumption of risk is one of fact for the jury to answer, unless the facts are undisputed and present a situation so plain that the minds of intelligent men could not draw different conclusions as to the effect thereof. Then, and then only, should the court declare as a matter of law that the risk was assumed. *C., O. & G. R. Co. v. Craig*, 79 Ark. 53, 95 S.

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W. 168; *Pettus & Buford v. Kerr* (Ky.) 112 S. W. 886; *Schlemmer v. Railway Co.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. The evidence here shows that the hostler violated the rules of the company made for the safety of the cinder shovelers by taking engines into the pit without signals. Complaint was duly made of this to the vice principal, and the next morning, after knowledge that his complaint had been properly lodged, Hawkins returned to his work, knowing that the servant complained of was still on duty. He had every right to assume, for a reasonable time, that his just complaint would be heeded, and that the master would require the offending servant to obey this simple and necessary rule to protect the life and limb of his fellow laborers. The court would have erred had it declared as a matter of law that the risk was assumed. No other question is presented.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. CORMAN *et al.*

(Supreme Court of Arkansas, Oct. 25, 1909.)

[122 S. W. Rep. 116.]

Executors and Administrators—Death—Statutes—Beneficiaries.—

Kirby's Dig. § 6289, provides that, where death shall have been caused by a tort, and the injured party could have sued therefor if he had not died, then the tort-feasor who would have been liable except for the death of the injured person shall still be liable in spite of such death, even though the death be caused under circumstances amounting to a felony. Section 6290 provides that an action for wrongful death shall be brought by and in the name of decedent's personal representative, and, if there be none, then by the heirs at law; the amount recovered being for the exclusive benefit of the widow and next of kin of the decedent, to be distributed in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. Held, that such statute creates two causes of action—one for the benefit of the estate to recover damages which the decedent could have recovered had he survived the accident, and the other for the benefit of the widow and next of kin for the damages which they sustained by the death.

Death—Nature of Action—Transitory Action—Jurisdiction.—An action by a decedent's widow and next of kin for his wrongful death is transitory, and may be maintained in a state other than that in which the accident occurred.

Death—Rights of Parties—What Law Governs.—The rights of the parties to an action for wrongful death must be determined in accordance with the law of the state where the injury occurred.

Death—Who May Sue—Widow as Heir.—A widow is one of the

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heirs at law of her husband within Kirby's Dig. §§ 6289, 6290, providing that an action for wrongful death shall be brought by the heirs at law of the decedent, the amount recovered to be for the exclusive benefit of the widow and next of kin.

Death—Actions—Parties Plaintiff—"Heirs at Law."—Where decedent was survived by a widow and one child, such widow and child were his only heirs at law within Kirby's Dig. §§ 6289, 6290, providing for an action for wrongful death to be brought by the heirs at law of the deceased person, and were therefore the only necessary parties plaintiff.

Master and Servant—Death of Servant—Railroads—Dangerous Track—Derailing Device.—In an action for death of a railroad brakeman in a collision between the engine on which he was riding and certain ballast cars left on a storage track, which had rolled down the descending grade onto the main track by reason of defective brakes and a failure to block the wheels, evidence held to warrant a finding of defendant's negligence in failing to install a derailing or other device to prevent the escape of such cars.

Master and Servant—Injuries to Servant—Assumed Risk.*—A servant assumes the risk of all dangers from the ordinary incidents of the service, but does not assume the risk of dangers arising from the negligent acts of his employer, unless, after becoming aware thereof and appreciating the danger, he exposes himself to it by continuing in the service.

Master and Servant—Injuries to Servant—Railroads—Derailing Device—Assumed Risk—Knowledge of Danger.†—A railroad brakeman whose duties did not limit his activities to any particular part of the railroad's right of way was not bound to know that the company had not provided a derailing or other safety device at a particularly dangerous point where a storage track connected with the main line on a descending grade to prevent a collision between trains on the main track and cars set out on the storage track which might run down the grade onto the main track because the defective brakes with which they were equipped were insufficient to hold them, and hence a brakeman in a train on the main track did not assume the risk of injuries sustained in such collision.

Master and Servant—Injuries to Servant—Negligence of Master—Concurring Negligence of Fellow Servant.‡—Where a railroad brakeman was injured because of the railroad company's negligence in failing to provide a derailer or other safety device at a dangerous

*See foot-note of *St. Louis, etc., Ry. Co. v. Harmon* (Ark.), 29 R. R. R. 104, 52 Am. & Eng. R. Cas., N. S., 104, where all the authorities on the subject in this series, preceding it, are collected.

†See first foot-note of second preceding case.

‡See third foot-note of *Stone v. Union Pac. R. Co.* (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119; second foot-note of *Britt v. Carolina Northern R. Co.* (N. Car.), 26 R. R. R. 453, 49 Am. & Eng. R. Cas., N. S., 453.

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switch, he was entitled to recover, though the negligence of his fellow servants concurred with that of the railroad company.

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by Emma Corman and another against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Murray L. Corman was a brakeman in the employ of the defendant railway company, and was killed by the derailment of an engine on which he was riding in the discharge of his duties on August 9, 1907, at Wagoner, I. T. The engine was pulling a local freight train and was approaching Wagoner, and was within the yard limits. Corman was on the running board of the engine, preparing to go down on the pilot for the purpose of operating a switch for the train to go in upon a siding. There was another track used as a passing and storage track—principally the latter—and a few minutes before Corman's engine reached the north end of the track some ballast cars standing on this track were struck and put in motion by other cars handled by the crew of another train. These cars rolled down the descending grade of the storage track to the end and out upon the main track, and collided with Corman's engine, while he was on it, overturning the engine and crushing him to death. This passing and storage track was about 2,500 feet long, and had a decided grade in each direction; the summit of the grade being about in the middle. The grade each way was steep enough that cars when once put in motion would roll to the end. There was no derailing device of any kind at the end of this track to prevent cars from rolling upon the main track. There were 15 or 20 or 25 of the ballast cars standing on the storage track, and the brakes on them were not in working order. When they were put in motion, a brakeman who was a member of the other train crew mounted the string of cars and tried to put on brakes so as to stop them, but, on account of the brakes not working, he failed to accomplish this. It is shown that in loading the ballast cars with a steam shovel gravel would get in the rachets of the brakes, thereby preventing their use. It is also shown that the brakes on some of them were out of working order in other respects.

The present action was instituted in the circuit court of Crawford county by Emma Corman, the widow, and Murray Corman, an infant child and sole heir at law of Murray L. Corman, deceased, to recover damages sustained by them as such widow and next of kin on account of the death of said decedent. There was no administration upon the estate. The complaint sets forth two charges of negligence against the defendant which are alleged to have been the proximate cause of Corman's death: One, that the defendant was guilty of negligence in failing to

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have a derailing device at the end of the storage track so as to prevent cars from rolling down the grade from that track upon the main track; and the other that the defendant was negligent in permitting cars on which the brakes were out of repair to be left on the storage track. The defendant in its answer denied the charges of negligence, and pleaded that Corman was guilty of contributory negligence, and also that he had assumed the risk.

The jury returned a verdict in favor of the plaintiff, assessing the damages at \$10,000. Judgment was rendered accordingly, and the defendant appealed. Other facts tending to explain the points at issue will be stated in the opinion.

Lorick P. Miles, for appellant.

Robt. J. White, for appellees.

MCCULLOCH, C. J. (after stating the facts as above). It is contended that the plaintiff cannot maintain this action, and that it can be maintained only by an administrator of the decedent's estate. This question was attempted to be raised by a demurrer to the complaint on the alleged ground that the plaintiff was without legal capacity to sue. It was also shown by evidence that the parents of said decedent were living, and the contention is made that they might, as such parents, claim damages by reason of the death of their son, and that the suit should therefore have been brought by an administrator. The statutes of Arkansas (section 6289, 6290, Kirby's Dig.), embodying the principles of the English Statute known as Lord Campbell's act, were in force in the Indian Territory when the injury in question occurred. One section of this statute reads as follows: "Every such action shall be brought by, and in the name of, the personal representative of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, every such action shall be commenced within two years after the death of such person." Act May 2, 1890, c. 182, § 31, 26 Stat. 94. This statute creates two causes of action—one for the benefit of the estate, to recover damages which the decedent could have recovered had he survived the accident, and the other for the benefit of the widow and next of kin, for the damages which they sustained by reason of the death. *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. The present action falls within the last-named

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class. It is a transitory action, and can be maintained in this state, but the rights of the parties must be determined in accordance with the law of the place where the injury occurred. *St. L., I. M. & Sou. R. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65.

Now, the statute provides that, "if there be no personal representatives, then the action may be brought by the heirs at law of such deceased person." Who, then, constitute the heirs at law? The widow is one within the meaning of the statute, for she receives a distributive portion of the recovery. *McBride v. Berman*, 79 Ark. 62, 94 S. W. 913. The child is the only other heir at law, and by the plain letter of the statute is the only other person who is a necessary party to the action. Nothing is found in the decision in the case of *McBride v. Berman*, *supra*, which militates against this conclusion. The action in that case was instituted by the widow alone, without joining the collateral heirs at law, there being no children of the decedent. Was the defendant company guilty of negligence in failing to install a derailing device so as to keep the cars from rolling off the storage track, and if so, did Corman assume the risk of the danger to which he was exposed by reason thereof? In considering the question of negligence, all the facts must be kept in mind. This was a track used, not only for trains to pass, but it was used mainly for the storage of cars. On it a large number of cars were stored daily, and among them was a considerable number of empty ballast cars with brakes out of order. It was the custom to store these cars there, and the ordinary use of them in loading them with dirt and gravel for ballast necessarily put the handbrakes out of service on account of gravel loading in the racks of the brakes. These cars were habitually left on the track in bunches and on a steep grade, which would cause them, when once put in motion, to roll to the end of the storage track and onto the main track, unless brakes were put on. The ordinary condition in which the brakes were left made it impossible for cars to be stopped when once put in motion, for it appears from the evidence that on the particular occasion in question a brakeman of the other train crew made every effort to stop the cars, but failed because the handbrakes could not be worked.

We are clearly of the opinion that these facts presented a situation which warranted the jury in finding that defendant was guilty of negligence in failing to exercise reasonable care to furnish a safe place to its employees at which to do their accustomed work. The situation thus described was a dangerous one—at least, the jury was warranted in finding that to be so—and defendant did not discharge its full duty to its employees merely by prescribing a system of rules requiring trainmen when they stored cars on the track to see that the brakes on them were set or that the wheels were blocked. Some device ought to have been in-

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stalled to prevent the escape of these cars from the storage track if they should be put in motion, for it was obvious to any one that, when once started down the grade, they would roll to the end, and go out on the main track where they would be likely to collide with trains. This is precisely what occurred when Corman was killed, and it was a catastrophe which could have been anticipated by an employer who was exercising the care of a reasonably prudent person for the safety of employees.

Nor can we hold as a matter of law, which learned counsel for appellant insist we should hold, that under the circumstances of this case Corman assumed the risk. That was a question of fact for the jury to determine, instead of a question of law for the court to decide, as the evidence presented a condition of affairs from which different minds might reach different conclusions. An employee by his contract of service impliedly agrees to assume and bear the risk of all dangers from the ordinary incidents of the service, but these do not include the dangers arising from negligent acts of his employer, unless, after he becomes aware of such negligence and appreciates the danger arising therefrom, he exposes himself to it by continuing in the service. Of course, if a person of ordinary intelligence is aware of a danger, he is presumed to appreciate it; but it does not necessarily follow that because one becomes aware of a negligent act he appreciates the danger arising therefrom. This may, under some circumstances, be a question of fact to be determined by a trial jury, unless the danger is obvious, in which case a person of average experience and intelligence, being shown to be aware of the negligent act, is presumed to appreciate an obvious danger arising therefrom. But it is not correct to say that an employee assumes the risk of danger arising from negligent acts of his employer merely because he could by the exercise of ordinary care have discovered the defect brought about by such negligence. This might constitute contributory negligence of an employee in failing to discover a defect, but it would not be an assumption of risk, for the doctrine of assumed risk is based upon and grows out of contract; and, before it can be said that the employee has assumed the risk of danger caused by his employer's negligence, it must appear that he was aware of the negligence and appreciated the danger. *St. L., I. M. & Sou. R. Co. v. Birch* (Ark.) 117 S. W. 243; *C. O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837.

We are not now speaking of the ordinary conditions of the service as existing when the employee took service, for of these he must take notice. When he enters into a contract to perform service for his employer, he agrees to work at the place expressly or impliedly designated in the contract, and with the tools and appliances regularly furnished by the master for use, "so far as these things were open and obvious, so that they could readily

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be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *C., O. & G. R. R. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83. A familiar illustration of this is the general use or failure to use unblocked frogs in the operation of railroads. It is obvious to any employee whether or not the plan of blocking frogs at switches has been adopted, and one who takes service for the purpose of engaging in the operation of trains must take notice of that which is obvious to all. Learned counsel insist that, because we have held in *C., O. & G. R. Co. v. Thompson*, *supra*, and in other cases, that a railroad employee must take notice of the use of unblocked frogs, we should hold, in necessary consequence, that he must take notice of the failure to use a derailing device on each side track along the entire line of road where they work. This does not follow, for we think it would be unreasonable and unjust to say as a matter of law that railroad trainmen must take notice and be deemed to have contracted to assume the risk of every defect existing along the entire line of road which is obvious to one working at the particular place where it exists. To illustrate: To a switchman working daily in a certain yard the defective condition of a certain switch would be obvious; but not so to a brakeman who passes through the yard on his regular trip without using this particular switch. Nor is the failure, generally as a plan of operation, to use derailing devices, comparable with the use of unblocked frogs. If the unblocking of frogs is due to the general plan of construction which is adopted along the line of the road, an employee would have to take notice of the fact of the general plan of construction adopted; but the exercise of ordinary care might require the use of a derailing device at some particularly dangerous place, even though the general plan of construction did not include the use of any such device, and an employee who is bound to take notice of the general plan of construction would not necessarily be bound to assume that a device especially needed at a particularly dangerous place had not been installed. It would be a question of fact for the determination of a jury, under all the circumstances of the case, whether or not the employee knew that the particular device was not used at the particular place.

But it does not even appear in this case from the evidence that derailing devices were not adopted at all on the line of road along which Corman worked. On the contrary, it affirmatively appears that they were used at some places along the line. It is true that the evidence shows that they were not used generally at side tracks; but this track was used mainly for storage of cars, and the grade was exceptionally steep. It was an extraordinarily dangerous place, a place of unusual peril to crews of passing

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trains, on account of the circumstances described. Whether Corman knew that no derailing device was in use at this place, or whether he should have inferred from the fact that they were not used at other passing tracks that none was used at that place, was peculiarly a question for the determination of a jury. There was no direct evidence at all that Corman actually knew that no derailer was used there, no evidence that he ever used that track in his work, nor any as to the length of time he had been working along that division of the road. He was not using the track at the time of the injury. We conclude, therefore, that the evidence warranted a finding that Corman did not assume the risk.

We are also of the opinion that there was sufficient evidence to warrant the submission to the jury of the question whether or not the defendant was guilty of negligence in allowing the ballast cars with defective brakes to be habitually left standing on this storage track where there was no derailer. Even if the negligence of the fellow servants of Corman concurred with that of the master in causing the injury, the latter is responsible, for it is plain that, but for the absence of the derailing device, the injury would not have occurred. *Chicago Mill & Lbr. Co. v. Cooper* (Ark.) 119 S. W. 672. The giving and refusal of instructions is complained of as error, but it is not necessary to discuss these assignments further than to say that the several rulings of the court and the instructions referred to violate no principle herein announced, and we find no error in them.

Judgment affirmed.

RYLAND *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida, May 18, 1909.)

[49 So. Rep. 745.]

Master and Servant—Injuries to Servant—Duty of Railroad Company.—A railroad company, like other public utility corporations, should be required to make reasonable provision for the safety of its employees and patrons, and to respond, in damages as required by law for the negligence of its employees that proximately cause injury to others; but such corporations should not be required to compensate injuries for which in law they are not responsible.

Master and Servant—Injuries to Servant—Negligence—Hidden Defects.*—In an action by an employee of a railroad company for damages for personal injury, allegations that the defects in the car complained of were "concealed from open observation," and were "concealed * * * and not noticeable by outward observation," do not show negligence on the part of the railroad company, when not supported by an allegation that the defendant knew of such defects, or by the exercise of ordinary care should have known of them.

Master and Servant—Injuries to Servant—Contributory Negligence.†—It is the duty of employees to exercise ordinary and reasonable care to avoid injury to themselves, and failure to observe this duty may be such fault or negligence as precludes a recovery under the statute from the master for injuries received by an employee.

Master and Servant—Injuries to Servant—Contributory Negligence.‡—An employee of a railroad company, who is injured "by the running of the locomotives, or cars, or other machinery of such company," where "the damage was caused by the negligence of another employee," is entitled to recover damages from the company only when the injury is caused "without fault or negligence on the part of the person injured."

*See foot-note of *Jenkins v. St. Paul City Ry. Co.* (Minn.), 31 R. R. 256, 54 Am. & Eng. R. Cas., N. S., 256; first foot-note of *Southern R. Co. v. Moore* (Va.), 30 R. R. R. 487, 53 Am. & Eng. R. Cas., N. S., 487; last foot-note of *Pennsylvania R. Co. v. Forstall* (C. C. A.), 30 R. R. R. 1, 53 Am. & Eng. R. Cas., N. S., 1; foot-note of *Ultina Thule, etc., Co. v. Calhoun* (Ark.), 29 R. R. R. 569, 52 Am. & Eng. R. Cas., N. S., 569.

†See last foot-note of *St. Louis, etc., Ry. Co. v. Harmon* (Ark.), 29 R. R. R. 104, 52 Am. & Eng. R. Cas., N. S., 104.

‡For the authorities in this series on the subject of contributory negligence of, or assumption of risk by, the injured servant on the right to recover against the master under an employers' liability act, see last foot-note of *Indianapolis Union R. Co. v. Waddington* (Ind.), 29 R. R. R. 487, 52 Am. & Eng. R. Cas., N. S., 487; last foot-note of *Hairston v. United States Leather Co.* (N. Car.), 26 R. R. R. 595, 49 Am. & Eng. R. Cas., N. S., 595; fourth head-note of *Schlemmer v. Buffalo, etc., Ry. Co.* (U. S.), 26 R. R. R. 190, 49 Am. & Eng. R. Cas., N. S., 190.

Ryland v. Atlantic Coast Line R. Co**Master and Servant—Injuries to Servant—Contributory Negligence.**

—Where an employee has negligently failed to exercise his authority over another employee to prevent an injury to himself caused by the negligence of the other employee, he cannot recover from the master under the statute, which requires the injured employee to be "without fault or negligence" in order to recover from the master for the negligence of another employee.

(Syllabus by the Court.)

In Banc. Error to Circuit Court, Osceola County; Minor S. Jones, Judge.

Action by Harry L. Ryland against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

On a former writ of error a judgment for Ryland was reversed because the declaration did not state a cause of action. Atlantic Coast Line R. Co. v. Ryland, 50 Fla. 190, 40 South. 24. After the cause was remanded an amended declaration was filed. A demurrer thereto was sustained, and the plaintiff took writ of error to a final judgment for the defendant entered on the demurrer.

The material allegations of the amended declaration are as follows: "The plaintiff on the 2d day of September, A. D. 1903, was in the employ of the defendant, the Atlantic Coast Line Railroad Company, a corporation doing business in the state of Florida, and was engaged in the performance of his duties on a section force of the defendant; that on the 2d day of September, A. D. 1903, the plaintiff with other servants of the defendant was on a certain hand car on the track of the defendant railroad in the county of Osceola, said car being furnished by the defendant for the use of the plaintiff and other servants of the defendant, in the performance of his and their duties, and said hand car being propelled by manual labor; and the plaintiff further says that while on said hand car it was his duty to look out for trains approaching the direction of said hand car; and the plaintiff further says that while in the performance of this duty and looking in the direction opposite to that in which the said hand car was being propelled he suddenly observed that the said hand car swayed violently to and fro, and looking around he observed that one of the servants of the defendant corporation whose duty it was to work part of the mechanism which propelled the said hand car was, working the same with his back turned the way the car was going, and that the said servant would carelessly and negligently pull first with one hand and then suddenly and carelessly change to the other hand, thereby causing the said hand car to run unevenly and sway violently, and cause the said car to be in danger of being derailed and precipitate the plaintiff and others from

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the car and inflict injury upon them; that the plaintiff immediately ordered the said servant (so negligent), and whose name was and is unknown to the plaintiff, to cease his negligence and pull steadily with both hands, or to take his seat and cease endangering the safety of the car and those upon it; but the plaintiff says that simultaneously with the plaintiff giving said instructions, and before the plaintiff could take any other or further steps to enforce said order and to compel the negligent servant to cease his negligence, the said servant again negligently and carelessly changed from one hand to the other, thereby pulling the mechanism of said hand car unevenly and violently, and by reason of said carelessness and negligence the said hand car again swayed violently and became derailed, the plaintiff being unable, by the instantaneous repetition of the act of negligence and the immediate derailling of said car, to assert any other or further authority over the said negligent servant, his order to said servant to cease his negligence not being fully spoken when the said act of negligence was repeated; and this plaintiff by reason of the negligence aforesaid was violently hurled from said hand car to the ground, plaintiff being entirely without negligence or fault on his part, the plaintiff sustained great and serious injury, to wit" (injury described).

"Second Count. On the 2d day of September, A. D. 1903, the plaintiff was an employee of the defendant Atlantic Coast Line Railroad Company, and was employed by the defendant to work on a section force on the line of the defendant's road in the county of Osceola; that in performance of the duties of the section force it was necessary to use a hand car propelled by work, which hand car was furnished to the said section force by the defendant; and the plaintiff says that he had been employed by the defendant but a little over two weeks, and had not had time to become acquainted or familiar with the appliances furnished by the defendant for the use of its said employees on the section force; and the plaintiff says that it was the duty of the defendant to supply to said section force all necessary appliances for the use of said section force in the performance of its duties on the defendant's road; and the plaintiff says that a hand car was necessary appliance to be furnished by the defendant for the use of its said section force, and it was the duty of the defendant to supply a hand car of reasonable safety and with its machinery in reasonably good order; but the plaintiff says that the defendant, regardless of its duty in this respect, furnished to the said section force for the use of the plaintiff and other employees working in said section force, a certain hand car whose machinery was defective and not reasonably safe, in that the running gear of said car was loose and caused the car to sway violently when it was propelled, and to cause said hand car to be in danger of being derailed by reason of said violent swaying; and the plaintiff says that said defect in the hand car was concealed from open observation, the running

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gear of said hand car being concealed under the hand car and not noticeable by outward observation; and the plaintiff says that prior to the date of the accident as aforesaid he had not used the hand car but two or three times, and then it was run very slowly, and he was walking on the ground, and did not know, and was not informed, and could not see the defect in said hand car by observation thereof, and that it was not his duty to inspect the condition of the working gear or mechanism under the hand car to ascertain if there were any defects therein concealed from his view. And the plaintiff says that, not knowing and not being informed of the defective condition of said hand car, and not having time or opportunity by his use of said hand car to ascertain and become advised of the defective condition of the running gear of said car, concealed from his view, and not having previously used said hand car so as to ascertain and learn that the running gear thereto was in defective condition, and not being required as part of his duty to inspect the running gear of the said hand car and ascertain that it was loose and defective in the mechanism concealed from view, on the said 2d day of September, A. D. 1903, while in the county of Osceola on the track of defendant's railroad on the said car in the proper performance of his duty and while said car was being propelled by the other servants and employees of the defendant, and while this plaintiff was in the performance of his duty looking out for approaching trains of the defendant, one of the servants of the defendant, propelling said car, carelessly and negligently propelled the same with one hand, and then suddenly changed to the other hand, whereby the said car, by reason of the running gear concealed beneath said car being loose and defective and not in reasonably good condition, and by reason of the negligence of the defendant's said servant, and the defective condition of said hand car, said car was derailed and thrown from the track; and the plaintiff says that he was then and there on the said car, and for the first time learned and became advised that the running gear of said car concealed beneath the car was loose and defective, and that as soon as he felt said car sway violently and observed the said condition thereof he promptly ordered the said negligent servant to cease his negligence and propel with both hands steadily and evenly, but before he could enforce his order and compel said servant to cease his negligence, and before he could take any steps to stop the said servant, the said servant continued and repeated the negligence, and by reason thereof, and of the defective condition of the running gear of the said hand car concealed from view, the said hand car was derailed; the plaintiff being unable by the instantaneous repetition of the act of negligence and the immediate derailling of the car to assert any other or further authority over the said negligent servant, his order to said servant to cease his negligence not having been fully spoken when the said act of negligence was repeated, and the said hand

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car being thus derailed by the negligence aforesaid, the plaintiff was thrown from the car, and hurled violently to the ground, and sustained injuries as follows, to wit" (injury described).

"Third Count. The plaintiff, on the 2d day of September, A. D. 1903, was in the employ of the defendant Atlantic Coast Line Railroad Company, a corporation doing business in the state of Florida, and was engaged in the performance of his duties on a section force of the defendant; that on the said 2d day of September, A. D. 1903, the plaintiff, with other servants of the defendant railroad company, in the county of Osceola, said car being furnished by the defendant for the use of the plaintiff and other servants of the defendant, in the performance of his and their duties, said hand car being propelled by manual labor; and the plaintiff further says that while on said hand car it was his duty to look out for trains approaching the direction of said hand car; and the plaintiff further says that while in the performance of his duty, and looking in the direction opposite to that in which the said hand car was being propelled, he suddenly observed that the said hand car swayed violently to and fro, and, looking around, he observed that one of the servants of the defendant corporation, whose duty it was to work part of the mechanism which propelled the said hand car, was working the same with his back turned the way the car was going, and that the said servant would carelessly and negligently pull first with one hand and then suddenly and carelessly change to the other hand, thereby causing the said hand car to run unevenly and sway violently, and cause the said hand car to be in danger of being derailed and precipitate the plaintiff and others from the car and inflict injury upon them; that the plaintiff immediately ordered the said servant, so negligent, and whose name was and is unknown to the plaintiff, to cease his negligence and pull steadily with both hands, or to take his seat and cease endangering the safety of the car and those upon it; but the plaintiff says that simultaneously with the plaintiff giving said instructions, and before plaintiff could take any other or further steps to enforce said order and to compel the negligent servant to cease his negligence, the said servant again negligently changing from one hand to another, thereby pulling the mechanism of said hand car unevenly and violently, and by reason of said carelessness and negligence the said hand car again swayed violently and became derailed, the plaintiff being unable, by the instantaneous repetition of the act of negligence and the immediate derailing of the car, to assert any other or further authority over the said negligent servant, his order to said servant to cease his negligence not being fully spoken when the said act of negligence was repeated, and by reason of the negligence of the servant as aforesaid, and the violent swaying of the car as aforesaid, the servant so negligent was instantaneously and by his negligence thrown from the hand car, and the car, coming in con-

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tact with the said negligent servant, was then and there derailed; and this plaintiff by reason of the negligence aforesaid was violently hurled from said hand car to the ground, plaintiff being entirely without fault or negligence on his part, and plaintiff sustained great and serious injury, to wit" (injury described).

The plaintiff claims \$10,000 damages on each count.

The grounds of the demurrer are:

"First. That each count in said declaration is argumentative and uncertain.

"Second. That neither count in said declaration states a cause of action.

"Third. That the plaintiff shows by each count of the declaration that any injury received by him was caused by risk assumed by him in his employment.

"Fourth. That the plaintiff shows by each count of the declaration that he was in charge of his collaborators at the time of the alleged injury, and was responsible for their acts, and that it was through his own fault that he was injured.

"Fifth. That the said plaintiff shows in each count of said declaration that the defect, if any, existing in said hand car was or ought to have been known by reasonable diligence to the said plaintiff, and that he assumed the risk of using said hand car."

Alex. St. Clair-Abrams, for plaintiff in error.

Sparkman & Carter, for defendant in error.

WHITFIELD, C. J. (after stating the facts as above). Unless the amended declaration sufficiently states matters not contained in the original declaration that constitute a cause of action, the cause is *res adjudicata*, and the judgment for the defendant should be affirmed, since the adjudication of matters presented by the former declaration is now the law of the case. *McKinnon v. Johnson*, 57 Fla. —, 48 South. 910.

A railroad company, like other public utility corporations, should be required to make reasonable provision for the safety of its employees and patrons, and to respond in damages as required by law for the negligence of its employees that proximately causes injury to others. But such corporations should not be required to compensate injuries for which in law they are not responsible. Unlawful and unreasonable requirements of public service corporations would cause unjust injury to those whose labor and property are used in rendering the public service, and would injuriously affect the service and the rates thereof afforded to the public, thereby violating positive law and public policy. *Hildreth v. Western Union Tel. Co.*, 56 Fla. —, 47 South. 820. Damages may not be recovered from a railroad company for every injury received in the operation of railroad cars, whether the company is reasonably and legally responsible for the injury or not. Such a rule would be patently unjust and detrimental to the public welfare.

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The allegations of the declaration that the hand car was defective and that the defect "was concealed from open observation," and that such defect was "concealed under the hand car and not noticeable by outward observation," are not supported by any allegation that the defendant knew of such defect, or by the exercise of ordinary care should have known of it, so as to show negligence on the part of the defendant.

It is the duty of employees to exercise ordinary and reasonable care to avoid injury to themselves, and failure to observe this duty may be such fault or negligence as precludes a recovery under the statute from the master for injuries received by the employee. *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740; *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148. The statute under which this action is brought expressly provides that where an employee of a railroad company is engaged in certain hazardous employments, and is injured by the negligence of another employee of the company, a right of recovery from the company exists only where the injury was caused "without fault or negligence on the part of the person injured."

Whatever may be the common-law doctrine of contributory negligence and of assumed risk, under the statute authorizing this action, where the plaintiff was an employee of a railroad company who was injured "by the running of the locomotives, or cars, or other machinery of such company, and the damage was caused by negligence of another employee," the plaintiff, to be entitled to recover damages from the company, must by the terms of the statute be "without fault or negligence."

It has frequently been held that a recovery under the statute for an injury caused by the negligence of another employee can be had only when the injured employee of the railroad company was entirely free from fault. *Florida Cent. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 South. 148; *Duval v. Hunt*, 34 Fla. 85, 15 South. 876; *Atlantic Coast Line R. Co. v. Ryland*, 50 Fla. 190, 40 South. 24; *Little v. Southern R. Co.*, 120 Ga. 347, 47 S. E. 953, 66 L. R. A. 509, 102 Am. St. Rep. 104; *Western & A. R. Co. v. Herndon*, 114 Ga. 168, 39 S. E. 911.

It appears from each count of the amended declaration that the plaintiff was exercising immediate authority over the other employees alleged to have been negligent, and that the plaintiff could by the exercise of his authority have avoided the accident if he had given timely orders or directions to the negligent employee.

If it can be assumed or inferred that some other conduct on the part of the person who was propelling the hand car as alleged in the declaration was the proper conduct under the circumstances, it may also be assumed or inferred that the conduct complained of was not so sudden and effective in causing the accident as that the plaintiff could not by the exercise of ordinary and

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reasonable care have observed it and ordered it stopped in time to avoid the accident. The plaintiff it seems, had ample authority to protect himself, and if he negligently failed to exercise his authority in time to avoid injury to himself he cannot recover in this action. It does not appear to be reasonable to assume that the plaintiff could not and should not have observed the speed of the car and the improper action of his subordinate necessary in causing the car to sway in time to prevent the accident. On the contrary, the alleged swaying of the hand car must have been accelerated by undue speed and must have gradually increased in violence, and if the plaintiff had exercised care in time by ordering the improper conduct to cease there would probably have been no such serious accident as is described. It appears from the declaration that the plaintiff had previously been present when the hand car was used at slow speed without injury to any one, and even if the car was not in a reasonably safe condition, and the plaintiff was not at fault in not observing its condition, the accident would most probably not have occurred, but for the failure of the plaintiff to require proper conduct on the part of his subordinate, who was, under the plaintiff's direction, engaged in propelling the car at too high speed and in an improper manner.

From the allegations of the declaration and the inferences fairly drawn therefrom it appears that, in not duly exercising the authority he had over the alleged negligent and careless subordinate, the plaintiff was not "without fault or negligence" as required by the statute as a prerequisite to a right of action to recover from the railroad company damages for the injuries complained of. *Atlantic Coast Line R. Co. v. Ryland*, 50 Fla. 190, 40 South. 24.

Approximate cause of the injury as alleged is the negligence of the subordinate employee, who was under the immediate authority of the plaintiff, and whose alleged negligence could have been checked by the plaintiff, if he had exercised his authority with ordinary care and attention to his duty and safety. It appears that the plaintiff did not duly exercise his authority and did not perform his duty to himself with ordinary care. Even though "the damage was caused by negligence of another employee," it does not appear to have been done "without fault or negligence on the part of the person injured" as required by the statute.

The judgment is affirmed. All concur.

BLACK v. ROCK ISLAND, A. & L. R. Co. *et al.*

(Supreme Court of Louisiana, Nov. 29, 1909. Rehearing Denied Jan. 17, 1910.)

[51 So. Rep. 82.]

Railroads—Crossing Streets—Duty to Public.—A corporation exercising a franchise to operate steam cars on tracks crossing the streets of a town incurs the correlative obligation to use such privilege with due regard to the public safety and to maintain its tracks in a safe condition, and it cannot escape liability for failure to discharge such obligation by transferring, or attempting to transfer, it to an employee or other person.

Railroads—Liability for Acts of Agents.—A railroad corporation, being incorporeal and incapable of acting save through agents selected by it, when it places in the custody and under the control of certain agents so selected its depot, locomotives, and tracks, and vests in them the authority to operate the locomotives, over the tracks, with a certain discretion and subject to certain instructions, but with the actual power to operate them when they please, must be regarded as represented by such agents, within the sphere of authority conferred on them, and should be held liable to a third person, injured through the negligent, or improper use, or abuse, of the power and discretion vested in such agents.

Railroads—Liability for Acts of Agents.*—Where the agents of a railroad company are placed in charge and control of its depot, locomotives, and tracks in a town, with authority to operate the locomotives over the tracks, for switching and other purposes (connected with the business of the company), and with actual power to operate them when they please, and the agents whilst operating them for their amusement across a street of the town negligently injure a citizen, who is legitimately using the street, such agents will be held to be acting, though improperly, within the scope of authority conferred on them, and the company will be held liable for the injury resulting from such action.

Railroads—Operating Locomotive Across Street—Injury—Shifting of Responsibility to Agent.—The right to operate a steam locomotive on or across a street in a town involves the use of an agency highly dangerous to life, limb, and property, and the responsibility for the

*For the authorities in this series on the question, what acts are, and are not, within the scope of employment of a railroad employee, see last paragraph of foot-note of *Sawyer v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530, where all those preceding it are collected; last foot-note of *Jones v. Seaboard A. L. Ry. Co.* (N. Car.), 32 R. R. R. 139, 55 Am. & Eng. R. Cas., N. S., 139; first head-note of *St. Louis, etc., Ry. Co. v. Lavendusky* (Ark.), 32 R. R. R. 97, 55 Am. & Eng. R. Cas., N. S., 97.

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exercise of such right cannot be shifted by the corporation in which it is vested to the person who by its authority actually exercises it.
(Syllabus by the Court.)

Appeal from the Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by Amos A. Black against the Rock Island, Arkansas & Louisiana Railroad Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Barksdale & Barksdale and *Thos. S. Busbee*, for appellants.
Blackman & Overton, for appellee.

Statement of the Case.

MONROE, J. Plaintiff seeks to recover damages for personal injuries alleged to have been sustained through the fault of the defendants. Defendants deny, generally and specially, the allegations of the petition, and allege that plaintiff was a trespasser on their railroad, and was injured through his own negligence. There was judgment in the district court in favor of plaintiff for the sum of \$17,000, with interest, and the defendants, the Rock Island, Arkansas & Louisiana Railroad Company and Chicago, Rock Island & Pacific Railway Company, have appealed.

It is shown by the evidence in the record that, when he received the injuries of which he complains, plaintiff was about 39 years of age, and that his expectation of life was 28.9 years; that he had been in the railroad service for about 20 years; that a few years prior to the occasion in question he had lost all the fingers (save the little finger, which was left twisted) and the thumb of his right hand; that he was never drunk in his life; that prior to the accident in question, notwithstanding the condition of his right hand, he had been earning from \$75 to \$110 per month as a switchman in the employ of the Illinois Central Railroad Company; that on December 31, 1907, being in the town of Lecompte, he was invited by Louis Peterson, master mechanic in defendant's employ, to come down to the railroad yard that night to celebrate the old year out and the new year in, and that a little before midnight he started in the direction of the yard, in company with several other men, who, however, walked faster than he, so that they reached defendant's railroad tracks at a point where they (four of them) cross Gordy street, some distance ahead of him; that Gordy street is a public street of the town, and that plaintiff used it in approaching the tracks which cross it; that the night was quite dark, and that the crossing was not lighted; that just before he reached the crossing an engine, with a tender and a flat car behind it, had passed across the street (from the direction of defendant's depot, which is situated about 50 feet to the north of the street), going in a southerly direction;

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and that about the time that defendant arrived near the crossing there were in the vicinity some five engines, the whistles of which were blowing and the bells of which were ringing. It is also shown that some railroad torpedoes had been, and were being, exploded, probably, by the train to which we have referred, whilst on its trip to the southward; that a "fusee" was burning at some point to the west side of the tracks; that a bonfire was or had been burning to the southwest of the crossing at a distance of 120 or 125 feet, but that neither the fusee nor the bonfire served to light the crossing; that plaintiff in attempting to cross the tracks was struck by the train, which, having gone southward shortly before, was then returning to the northward in the direction of the depot with the flat car in front; that there were no lights or look-outs on the train, whether upon the engine or upon the flat car; that no warning was given to plaintiff; and that as the result of the accident plaintiff lost his left arm near the shoulder, had one of his ears torn partly off, was injured in the face, and more seriously in the back, and is, and will be hereafter, unable to perform any physical labor by which to earn a livelihood. It is also shown that he was laid up for several months, incurred considerable expense, and suffered greatly, both physically and mentally. It is further shown that defendant's road was at that time in process of construction, and that the ranking officer in this state was Col. Knobel, a civil engineer, who had charge of the work of construction; that different branches of the work were under supervision of different persons; that the motive power and rolling stock, including the engines and cars at the depot, were under the control of Clint Fausnacht, save that, when they needed repairs, they were turned over to Louis Peterson, the master mechanic; that a switching crew was maintained at the depot, and did a great deal of switching across Gordy street, being sometimes so engaged all night; that Fausnacht and a fireman, by the name of Curtis Earnest, were on the engine of the train by which plaintiff was hurt, and that Earnest was running it, and it is also shown that Louis Peterson was present. Fausnacht and Peterson were employed and paid by the month, but Earnest was paid by the hour, and Col. Knobel testifies that the pay rolls do not show that he was paid for the hour in which the accident out of which this litigation arises occurred. Plaintiff testifies that, when he approached the tracks, he looked up and down and saw no car, and, whilst the other men who had preceded him and had crossed the tracks in front of the locomotive seem to have seen it (in fact, one of them had got on it), they concur in saying that the night was dark. The failure of plaintiff to see the train may therefore, perhaps, be accounted for by the fact that as it approached him the flat car, which, as we take it, was less conspicuous than the locomotive, was in front. Col. Knobel also testifies that he was at his place of residence, some distance away,

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and hearing the noise, came out of the house and started in the direction of the depot; but being told that the men were merely celebrating, and discovering that the fire which he saw was merely a bonfire, and the noise ceasing about that time, he returned to his quarters, and did not hear of the accident until the next day, when he reprimanded Fausnacht and Peterson.

Opinion.

We are of the opinion that the accident was attributable to the gross negligence of the persons who ran an engine and car without lights or lookouts across the street of a town on a dark night, and that the evidence adduced fails to show any contributory negligence of the party injured which should preclude him from recovering damages.

There is really no positive testimony in the record as to the purpose of Fausnacht and Earnest in moving the train (as, for convenience, we shall call the engine and car) by which plaintiff was struck out of the depot, but the inference is that it was done merely by way of celebrating the occasion, and, with that view, of running over and exploding certain torpedoes which had been laid on the track, and that apparently was accomplished as the train passed down. When, however, plaintiff was injured, defendant's employees were engaged in taking the train back to the depot, where it belonged, and the basis upon which the learned counsel rest their argument, that defendants cannot be held liable because, when the injury was inflicted upon plaintiff, their employees, to whose negligence it was attributed, were not engaged in the discharge of any service to them, or within the scope of their employment, disappears entirely; for, conceding that, in taking the train out of the depot merely for their own amusement, the men whom defendants had placed in charge of it were rendering no service to defendants and were doing nothing that they were employed to do, it can hardly be denied that their duty to defendants as custodians of the property required that it should be returned to the place from which they had taken it. If this be regarded as a narrow basis for the conclusion that the defendants should be held liable in the premises, it may be answered that it is at least as wide as that upon which defendants rest the proposition that they should be exempted from liability because the men placed by them in actual custody and control of their cars and tracks to be used when defendants' interests require were, at the moment, making use of the power so conferred for purposes of their own, from which, it would follow logically that if the conductor of a train arriving at a station ahead of the schedule time should, for his own convenience, move it a few feet or inches from where it originally stopped, and in doing so negligently inflict injury upon a third person, the owner of the train would incur no liability, though for an injury so

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inflicted before and after such movement the liability might be conceded.

The broader, and as it seems to us correct, view of the case presented is that defendants, being vested with a franchise (that is to say, a privilege conferred upon them by the state, and not enjoyed by citizens generally of common right), by virtue whereof they were authorized to lay their tracks across a public thoroughfare in an incorporated town, and to operate cars propelled by steam power thereon, incurred certain correlative obligations, and among them the obligation to use their franchise with due regard to the public safety. The implied condition upon which they were allowed to lay their tracks across a street which is open to the public was that they should keep the tracks in a safe condition, and that neither they nor those for whose acts they are responsible should operate their cars over them in a manner unnecessarily to endanger the lives or limbs of those who had the right to use the street. The defendants themselves, being mere intellectual and intangible creations, have no capacity to act otherwise than through their human representatives, and they can be present at the place where their interest or obligations require that they shall be present, and their act only through such representatives; and, on the other hand, when they authorize certain actual persons to represent them at a particular place and time with respect to such interest and obligations, and the persons are there, discharging the functions for which they are authorized, the corporations themselves are these discharging those functions in the only way in which they can discharge them, and the acts of the persons representing them are the acts of the corporations. The defendant corporations were in possession of their depot at Lecompte and of their motive power and of their rolling stock through Fausnacht. It is true that Fausnacht was subject to the orders of Col. Knobel, the engineer in charge of the construction of the road, but it is also true that Fausnacht was vested with a certain discretion, and with all of the actual power, with regard to the use of the motive power and cars, which were in his custody, over defendants' tracks; and, as Col. Knobel was subject to the orders of a superior officer in Chicago, it would be as reasonable to say that the corporations were not present in Louisiana through him as to say that they were not present at the depot through Fausnacht. But let us say that defendants were not present at the depot, that they were merely represented by subordinate employees, who, whilst entrusted with the absolute physical custody of the depot and tracks and of five "live" locomotives (i. e., locomotives with steam in their boilers) and other rolling stock, were limited as to the manner in which the property should be handled by their instructions, or lack of instructions. We know that those employees who might under their instructions have taken all of the locomotives out for switch-

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ing purposes took one of them with a flat car attached, and having no light of any kind on the train thus made up, ran down the plaintiff in the street, where he had as much right to be as they, and so injured him that he will be unable for the balance of his life to put on his own clothing. If the defendants had left one of their locomotives, alive or dead, on the street, and an inquisitive child had been injured whilst meddling with it, they would have been liable for the consequences; and, if that be true, why should they not be liable for the injury inflicted by the same locomotive through the gross negligence of the persons in whose custody they left it upon a person who was not meddling with it when injured, but was merely exercising his right to walk along the highway? There is no room here for the application of any fellow servant doctrine, for plaintiff was not in defendant's employ, and, as between him and them, the responsibility for the character and capacity of their employees rested entirely upon them. It was they who selected Fausnacht and Peterson and the switching crew and placed them in charge of their live locomotives, cars, and tracks, and it is they who should be held responsible for the acts of commission and of omission of the agents so selected in the handling of that property, with its capacity, when improperly handled, to inflict death and destruction. The agents mentioned were authorized to take locomotives out of the depot, and to cross and recross Gordy street all night long with them, and, if they had exercised that authority for the purpose of switching cars, it is conceded that they would have been acting within the scope of their employment. Defendants do not deny that they (the agents) were authorized to take out the locomotives, but they say that in taking them out for their amusement they did not rightfully use their authority, and hence that they (defendants) are not liable for the consequences to plaintiff.

This court has said, however (in a case upon which defendants seem to rely), that the earlier doctrine "that in general a master is liable for the fault or negligence of the servant, but not for the willful wrong or trespass, has been greatly modified in modern jurisprudence, which places the test of the master's liability, not in the motive of the servant or the character of the wrong, but in the inquiry whether the act done was something which his employment contemplated and which, if properly and rightfully done, would have been within the scope of his functions." *Williams v. Pullman Car Co.*, 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512.

Summing up our conclusions, upon the law of the case, we are of opinion that:

1. A corporation exercising a franchise to operate steam cars on tracks crossing the streets of a town incurs the correlative obligation to use such privilege with due regard to the public safety and to maintain its tracks in a safe condition, and it cannot escape

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liability for failure to discharge such obligation by transferring, or attempting to transfer, it to an employee or other person.

2. A railroad corporation, being incorporeal and incapable of acting save through agents, when it places in the custody and under the control of certain agents selected by it its depot, locomotives, and tracks, and vests in them the authority to operate the locomotives over the tracks with a certain discretion and subject to certain instructions, but with the actual power to operate them when they please, must be regarded as represented by such agents within the sphere of authority conferred on them, and should be held liable to a third person injured through the negligent, or improper use, or abuse, of the power and discretion vested in such agents.

3. Where the agents of a railroad company are placed in charge and control of its depot, locomotives, and tracks in a town, with authority to operate the locomotives over the tracks for switching and other purposes (connected with the business of the company), and with actual power to operate them when they please, and the agents, whilst operating them for their own amusement across a street of the town, negligently injure a citizen, who is legitimately using the street, such agents will be held to be acting, though improperly, within the scope of the authority conferred on them, and the company will be held liable for the injury resulting from such action.

4. The right to operate a steam locomotive on, or across a street in a town involves the use of an agency highly dangerous to life, limb, and property, and the responsibility for the exercise of such right cannot be shifted by the corporation in which it is vested to the person, who, by its authority, actually exercises it.

These conclusions, we think, find support in the following authorities to which we have been referred by counsel for the plaintiff, to wit:

Webb's Pollock on Torts, pp. 84-86; Commentaries on the Law of Negligence (Thompson) §§ 519, 589; Salisbury v. Erie R. Co., 66 N. J. Law, 233, 50 Atl. 117, 88 Am. St. Rep. 480; Nelson v. Railroad Co., 49 La. Ann. 491, 21 South. 635; Evans v. Lumber Co., 111 La. 534, 35 South. 736; Brown v. Ponch. R. Co., 8 Rob. 45; Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 210; Barmore v. Vicksburg S. & P. R. Co., 85 Miss. 426, 38 South. 210, 70 L. R. A. 627; Phil. & Reading R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Thompson on Negligence, §§ 522, 523, 532; Cooley on Torts, §§ 120, 536; Wharton on Negligence, § 160; Toledo, W. & W. R. Co. v. Harmon, 47 Ill. 299, 95 Am. Dec. 489; Pittsburg, etc., R. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. Rep. 840; Euting v. Chicago & N. W. R. Co., 116 Wis. 13, 92 N. W. 358, 60 L. R. A. 158, 96 Am. St. Rep. 936.

Counsel for defendants have also cited many authorities, but

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no good purpose would be subserved by reviewing them or attempting to show farther than we have done why we cannot agree with those which support their contentions. A portion of their brief is devoted to an effort to show that plaintiff's petition fails to disclose a cause of action, but, as they rely upon their view of the law, which we have discussed in the foregoing opinion, it is unnecessary that we should consider it farther than to say that the petition is an uncommonly long one and states all the facts connected with the accident in great detail, that it alleges specifically that plaintiff's injuries, minutely set forth, were caused in the manner described through the "wanton, willful, gross negligence of defendants, their agents, and employees, without any fault or contribution thereto whatsoever by the plaintiff."

Judgment affirmed.

RYAN v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Washington, May 26, 1909.)

[101 Pac. Rep. 880.]

Master and Servant—Injuries to Servant—Duty to Warn.*—It as a matter of law was not negligence for a railroad company to fail to warn a boy learning the position of call boy in its freightyard of apparent dangers, where, though not quite 17 years old, he was a man in experience, and fully appreciated the dangers.

Master and Servant—Injuries to Servant—Negligence.—Where freightyards were private, and no one but employees were permitted therein who necessarily would know immediately upon entering the yards that cars were liable to be moved at any time without any warning, and to sound whistles and ring bells would only create confusion, the fact that they were not sounded and rung did not tend to show negligence as to employees in the yards.

Master and Servant—Injuries to Servant—Contributory Negligence.—Where a boy not quite 17, and a man in experience, learning the position of call boy in freightyards, attempted to cross a string of cars which he knew, or should have known, was liable to be moved at any time, and he had not been directed to cross them, and there

*For the authorities in this series on the subject of the duty of the master to instruct and warn his employees, see second foot-note of *Arkansas Midland Ry. Co. v. Worden* (Ark.), 32 R. R. R. 106, 55 Am. & Eng. R. Cas., N. S., 106, where all those preceding it are collected; third head-note of *St. Louis, etc., Ry. Co. v. Jamison* (Ark.), 31 R. R. R. 677, 54 Am. & Eng. R. Cas., N. S., 677; first foot-note of *Arkansas Cent. R. Co. v. Workman* (Ark.), 31 R. R. R. 300, 54 Am. & Eng. R. Cas., N. S., 300.

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was no necessity therefor, and a safe way around the cars, his own negligence was the cause of injury in being thrown under the cars by a car shunted against the string of cars.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Francis M. Ryan, as guardian ad litem, against the Northern Pacific Railway Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Vince H. Faben and *S. H. Kelleran*, for appellant.

Carroll B. Graves, for respondents.

MOUNT, J. This action was brought by a minor, through his father as guardian ad litem, to recover damages on account of personal injuries received while in the employ of the Northern Pacific Railway Company. The cause was tried to the court and a jury. At the close of the evidence the court sustained defendants' motion for a directed verdict, and dismissed the action. The plaintiff appeals.

There is no dispute in the evidence. The facts are, in substance, as follows: The appellant Francis M. Ryan was employed by the respondent company as call boy in its freightyard office in Seattle to take the place of one Harvey Kelly, who desired a leave of absence for a short time. The employment of the appellant was obtained upon the recommendation of an older brother, who was at that time employed as a clerk in the freight office. At the time of his employment, which was August 21, 1906, the appellant was 16 years and 10 months of age. He was small for his age, but was a strong, healthy boy. He was directed to follow Mr. Kelly, who would show him and tell him about what his duties were, and he was to take Kelly's place, and his pay was to begin when Kelly should quit. During the afternoon of August 21st and the day of the 22d and up until about 4 o'clock of the 23d of August, 1906, the appellant followed Kelly around and was shown his duties, which were to deliver messages, bills, orders, etc., to the different freight offices in Seattle, and to call crews for the trains when directed. The clerks in the yard office deposited in a box kept for that purpose the messages and orders to be delivered by the call boy. There were six clerks in this office, and all their work was in connection with the freightyards. These yards were upon the private property of the respondent company. They were not crossed by any public streets, and no one was permitted therein, except employees. The yards were used for storing freight cars, for breaking up trains arriving, and for making up trains to leave the city. All of the freight trains of the respondent company were handled in these yards by switch engines. There were 21 switch and storage tracks, each holding about 50 cars, and there were usually from 800 to

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1,000 cars in the yard. Over these tracks there were operated at all times, both day and night, from 6 to 23 switch engines. Each switch engine had its own crew, consisting of five men, viz., an engineer, fireman, foreman, and two helpers. These crews received their orders from the yard office, and each had a separate district to work in. They governed themselves by silent signals, given by the hands during the day and by lanterns at night. Cars were continually being taken out of storage tracks and shunted therein without notice or warning of any kind. On August 23, 1906, at about 4 o'clock in the afternoon, the call boy, Mr. Kelly, and the appellant had made the rounds of the offices and delivered their messages and orders, when Kelly was requested by one of the clerks in the yard office to tack some cards on certain cars in the yard. This work was properly the work of the car checkers, and not of the call boy. Kelly, however, agreed to do this as an accommodation to the clerk, thinking it would be a service to the company. When Kelly started with the cards, the appellant followed him. They went around the cars of the yard to the track where the cars which were to be carded. These cars were standing on a track known as No. 5. After Kelly had tacked the cards on the cars and appellant had watched him do so, the two boys started to return to the office. While on their way, they came to a string of about a dozen cars standing on track known as No. 14. Kelly started to go around this line of cars the way they had come, but, upon the suggestion of the appellant that it would be nearer to cross over the cars, they undertook to do so. Kelly went through first, but, as the appellant was in the act of passing through, a car was shunted onto that track against the string of cars, and appellant was thrown off the car which he was attempting to cross, and his right leg was run over by the car, necessitating amputation below the knee. The way around the cars and the way the boys went in was perfectly safe. From where the boys started to cross the cars they could not see the end of the line where the switch engine was working; but, if they had stepped back 10 to 15 feet, they could have seen the switch engine. The appellant had been working for a period of about two years, free from parental control. He worked for one year in the Post-Intelligencer office at \$8 per week. Thereafter he worked at the plumber's trade for eight months, and qualified himself as a plumber, but was not permitted to work at his trade because he was not then old enough to join the union. Thereafter he obtained employment in a shingle mill some distance out of Seattle at \$2 per day, where he worked for a short time, and soon thereafter sought employment as a call boy with respondent company. He knew the system of switching the cars in the yard, although he said that was his first trip into the yard. He knew that the switch engines were continually shunting cars into the

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switches and taking them out. He knew there was a safe way back to the office the way they had come out, and that there was nothing to prevent returning that way. He evidently realized the danger in crossing the cars, because he said there was danger in crossing the tracks at the end of the cars. Upon these facts, the trial court was of the opinion that there was no negligence of the company shown, and that appellant assumed the risk of crossing the cars, and therefore directed a verdict for the respondent.

If the appellant in this case had been an adult, there can be no reasonable contention that he was not guilty of contributory negligence in attempting to cross a string of cars which he knew, or should have known, were liable to be moved at any time, especially when he was not directed to cross them, and when there was no necessity therefor, and when there was a safe way around the cars. But it is contended by the appellant that, because he was a boy, the question of his capacity and intelligence must be left to the jury, and several cases decided by this court are cited to that effect, among which are *Lorence v. Ellensburgh*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42, *Kirkham v. Wheeler-Osgood Company*, 39 Wash. 415, 81 Pac. 869, and *Kirby v. Wheeler-Osgood Company*, 42 Wash. 610, 613, 85 Pac. 62, 63. In the first two of these cases the minors were mere children, one eight and the other twelve years of age. In the last-named case, the minor was just entering upon his sixteenth year. In that case we said: "There is a time when a child is so young that the court can say as a matter of law that to employ him around dangerous machinery without fully instructing him as to the open and apparent dangers would be the grossest kind of negligence. So there comes a time in this same child's life when the court can say as a matter of law that a failure to warn him of the open and apparent dangers is not negligence. Between these two extremes, however, there is, and from the nature of things there must be, a debatable ground—a time when the inferences to be drawn from the fact are disputable, when the court cannot say as a matter of law that the omission to warn is or is not negligence. In such cases it is the province of the jury to draw the inference, and either party has the right to have the question submitted to them." This is a clear statement of the rule in such cases. In that case we held on account of the youth and inexperience of the boy the question of assumed risk was one for the jury. But in this case, while the minor was a boy not quite 17 years of age, he was a man in experience, and appears from his own testimony to have fully appreciated the danger. He therefore comes within the rule, "when the court can say as a matter of law that a failure to warn him of the open and apparent dangers is not negligence."

It is argued that the respondent was guilty of negligence on account of the manner in which the cars were handled in the yard, and for employing an inexperienced boy and assigning him to a

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dangerous place without warning him of the danger, and in directing him to follow Kelly without warning him especially of the dangers. The freightyards of the respondent were private yards. No one but employees were permitted therein. Any one knowing how the yards and cars were operated did not need any further warning. The fact that whistles were not sounded and bells were not rung did not tend to show negligence, because under the conditions there, where numerous engines were running backwards and forwards, such sounds would only create confusion, and would afford no protection. No one was supposed to be about the cars except employees, who necessarily would know immediately upon entering the yards that cars were liable to be moved at any time without any warning. Even if the appellant was directed to go into the yards, he knew of the conditions and the places where he would be safe; and, if he knew it was dangerous to cross a track where cars were not standing, as he testified he did, he must necessarily have known it was much more dangerous to cross over cars standing on such tracks. In view of the age and experience of the appellant as shown by his own evidence, we see no escape from the conclusion that his own negligence was the cause of his injury.

It is unnecessary to refer to many authorities cited in the brief of both the appellant and respondents, for the rule is, where there is no dispute in the facts and where the court is satisfied that the appellant was a man in experience and understanding, as appears in this case, it is then the duty of the court to decide as a matter of law that a failure to warn him of apparent danger is not negligence. The trial court did so decide in this case.

The judgment must therefore be affirmed.

RUDKIN, C. J., and CROW, GOSE, FULLERTON, and CHADWICK, JJ., concur. MORRIS and PARKER, JJ., not sitting.

CONRAD v. SPRINGFIELD CONSOL. RY. CO.

(Supreme Court of Illinois, April 23, 1909.)

[88 N. E. Rep. 180.]

Electricity—Injuries Incident to Use—Violation of Ordinance.*—

A violation by a street railway company, exercising the rights of another company under an ordinance granting a street railway franchise, of the provision of the ordinance prescribing the manner of guarding its wires, is prima facie evidence of its negligence, and the company is prima facie liable for injuries received from an electric shock communicated from its wires, not guarded as required by the ordinance.

Torts—Violation of Ordinance or Statute—Proximate Cause of Injury.—One charged with a tort resulting from the violation of a statute or ordinance may show that a compliance would not have prevented the injury complained of, but he cannot show the general inadequacy of the legislation as a means of preventing injury.

Negligence—Assumption of Risk.—The doctrine of assumption of risk is only applicable to cases arising between master and servant.

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; Robert B. Shirley, Judge.

Action by James T. Conrad against the Springfield Consolidated Railway Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Wilson, Warren & Child, for appellant.

T. J. Condon and Albert Salzenstein, for appellee.

VICKERS, J. On August 21, 1906, James T. Conrad was employed as a lineman by the Central Union Telephone Company. On that day he was engaged in taking down and putting up telephone wires on a telephone pole at the corner of Sixth and Monroe streets, in the city of Springfield, and while so engaged an old telephone wire which he was handling broke and fell upon a trolley wire belonging to the Springfield Consolidated Railway Company, carrying a high voltage of electricity, which was thereby communicated to his person, causing severe personal injuries. In an action on the case against the street railway company Conrad recovered a judgment for \$3,000, which has been affirmed by the Appellate Court for the Third District. The street railway company has prosecuted a further appeal to this court.

The declaration consists of three counts. The first and second counts charge that appellant acquired its right to operate the street car line in the city of Springfield by virtue of a certain ordinance passed by the city council of said city, the terms and

*See foot-note of *Mullane v. St. Paul City Ry. Co.* (Minn.), 30 R. R. R. 201, 53 Am. & Eng. R. Cas., N. S., 201.

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conditions of which were accepted by the appellant and its predecessor companies; that the said ordinance provided that such companies should stretch and maintain suitable guard wires over and above the electric cables and overhead wires at all points where the said railway ran, where other wires belonging to other companies were suspended over and above such electric cables. These counts charged that the Central Union Telephone Company maintained wires above the electric cables at the place where the accident occurred, and that thereby it became the duty of appellant to maintain suitable guard wires over its said cables at that point; that appellant neglected and failed to maintain such guard wires, by means whereof appellee, in the course of his duty as an employee of the telephone company, and while in the exercise of due care for his own safety, was injured by the broken telephone wire coming in contact with the unguarded electric cable of appellant. The third count was for common-law negligence, and charged a failure to properly guard and protect its cables so as to avoid the injury to the appellee by coming in contact with currents of electricity that were liable to be communicated from such cables through wires of other companies coming in contact therewith.

The appellee introduced in evidence an ordinance duly passed by the city council of Springfield, approved January 20, 1890, granting to the Citizens' Street Railway Company the right to operate its lines of railway in the city of Springfield by electric power. The ordinance prescribed the manner in which such railway company should erect its poles and put up its wires and other overhead construction. Section 7 of that ordinance is as follows: "That it is the duty of said company to stretch and maintain a suitable guard wire along and above its electric cables and over wires at all points within the city where other wires belonging to other companies are suspended over or above said electric cables. The same may be extended along the whole line of said railway when required by the council; and in case of willful violation of this section said company shall be subject to a fine of not exceeding \$200 for every day." The written acceptance of the Citizens' Street Railway Company of the foregoing ordinance, dated February 20, 1890, was introduced in evidence. It was admitted that appellant was the successor to the Citizens' Street Railway Company, and was exercising the rights and privileges of such company under the ordinance aforesaid.

At the request of appellee the court gave to the jury the following instruction: "The court instructs the jury that, under the ordinance of the city of Springfield offered and admitted in evidence in this case, it becomes and was the duty of the defendant to have guard wires over its trolley wire at all places where such trolley wire was crossed by the wires of other companies, and if you believe, from the evidence in this case, that at Sixth and

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Monroe streets, where plaintiff was injured, other companies, long previous to the day the plaintiff was injured, had wires over defendant's trolley wire, then it was and became the duty of the defendant to have and maintain guard wires at such place; and if you further believe, from the evidence, that the defendant failed so to do, and plaintiff was injured in the manner charged in the first two counts of his declaration, or in either of them, by a wire of the Central Union Telephone Company, which he was then and there attempting to remove, breaking and falling on defendant's unguarded trolley wire at said place, whereby the current from said trolley wire was transmitted against the person of plaintiff, and plaintiff at and before such injury was using ordinary care and caution for his own safety, then you will find a verdict for the plaintiff."

The rulings of the court upon objections made to certain testimony offered by the appellant were in accordance with the rule embodied in the foregoing instruction. The giving of this instruction, and the ruling upon the evidence in accordance therewith, are the subjects of appellant's most serious contention in this court. Appellant's position in respect to these rulings is that the ordinance granting the use of the streets upon certain conditions, and the acceptance thereof, constitute a contract between the city and appellant, and as such it should be construed like any other written contract, and that such contract was subject to suspension or alteration by the consent, expressed or implied, of the contracting parties, and, regarding the ordinance as a contract between the city and appellant, that no one not a party to such contract can maintain an action for a violation of its terms. We do not deem it necessary, in the view that we take of this question, to follow the elaborate line of argument presented by appellant's brief. Undoubtedly the ordinance in question for some purpose is regarded as a contract between the city and the railway company; but in so far as it lays duties upon appellant in the interest of the public it is essentially the legislative exercise of the police power of the city and designed to afford protection to the public against injuries such as appellee received. If appellant's contention were sustained, then appellee would have no remedy either against appellant or the city, neither could the city recover against appellant for the injury to appellee. Therefore appellant would not be liable to any one in any form of action, although its admitted violation of the condition of the provisions was the proximate cause of an injury to an unoffending member of the class for whose protection the condition was imposed. In *Commonwealth Electric Co. v. Rose*, 214 Ill. 545, 73 N. E. 780, this court had before it a state of facts not materially different from those presented in the case at bar. In that case the electric company was granted the use of the streets of the city of Chicago by an ordinance on the condition that the company would maintain guard

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wires. The circumstances of the injury in that case were very similar to those in the case at bar. It was there held that the ordinance was a valid exercise of the police power of the city, and that the violation of the ordinance was *prima facie* evidence of negligence. We think this question is properly disposed of under the authorities cited by the Appellate Court.

Appellant sought to prove that the use of guard wires was a menace rather than a protection, and that their use had been generally discontinued in recent years. This evidence was not offered for the purpose of proving that the accident in question was not the proximate result of the omission charged, but rather to show the reason why the appellant had been permitted for a number of years to disregard the condition. While one charged with a tort resulting from the violation of an ordinance or a statute may show in defense that a compliance would not have prevented the injury complained of, yet such evidence must be confined to the particular injury involved, and not directed to the general adaptability of the legislation as a means of preventing injury. This is a legislative question. The evidence excluded by the court, of which complaint is made, relates to this general question, with which the court was not concerned. There was no error in its exclusion.

Appellant's contention that appellee must be held, as a matter of law, to have assumed the risk, cannot be sustained, since the doctrine of the assumption of risk is only applicable to cases arising between master and servant. *Shoninger Co. v. Mann*, 219 Ill. 242, 76 N. E. 354, 3 L. R. A. (N. S.) 1097.

Other reasons urged for the reversal of this judgment are without merit.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

WILSON v. SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington, Nov. 15, 1909.)

[104 Pac. Rep. 1112.]

Street Railroads—Injuries to Travelers—Contributory Negligence.—Plaintiff, while driving along a street, was passed by a street car, and thereafter, while the car was standing at a station 230 feet away, plaintiff, believing the car would continue, started to cross the track behind it, when it started to return and struck his team before he could get across. Held, that plaintiff was not chargeable with such negligence as would preclude a recovery.

Street Railroads—Injuries to Travelers—Duty to Look and Listen.—A traveler's duty to look and listen for a street car prior to crossing the track was satisfied, when he saw the car stop at a station 230 feet away, and the surroundings indicated that it was about to travel in the opposite direction, and that a reasonably careful person might cross in safety.

Street Railroads—Operation of Cars—Reciprocal Duties.*—While a traveler must give way to a street car approaching so near that a reasonably careful person would not attempt to cross in front of it, it is likewise the duty of the motorman to have the car under reasonable control at places where travelers are likely to cross.

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by John C. Wilson against the Seattle, Renton & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Morris B. Sachs, for appellant.

Jackson Silbaugh, for respondent.

MOUNT, J. On February 19, 1908, the respondent was injured in a collision between a street car operated by appellant and a wagon and team of horses driven by respondent. An action brought against the railway company for personal injuries resulted in a judgment in favor of the plaintiff for \$3,000. The defendant appeals from that judgment, and argues that the trial court erred in denying appellant's motion for a nonsuit, in giving certain instructions, and denying a motion for a new trial upon the ground that the verdict is excessive.

*For the authorities in this series on the subject of the right of way as between a street car and another user of the street, see fourth foot-note of *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665.

For the authorities in this series on the subject of the duty to so regulate the speed of street cars as to have them under control, see last foot-note of *Kinlen v. Metropolitan St. Ry. Co.* (Mo.), 32 R. R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722.

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It appears that about 7:30 o'clock on the evening of February 19, 1908, respondent was driving a heavy wagon along the shore of Lake Washington, upon a plank roadway 16 feet wide. The street railway followed closely along this roadway, crossing it at a point known as "Weed station," and again at Oberlin street. At this latter place the car line crosses the roadway at an angle, following the roadway 90 feet in order to cross the same. From Oberlin crossing the car line proceeds on to Rainier Beach station. There is a slight curve between Oberlin crossing and Rainier Beach station. The distance between each two of the points named is about 240 feet. When respondent came up to Weed station, he crossed the street car track in front of appellant's car, which was stopped at that point permitting passengers to alight. At that time the car and respondent were headed in the same general direction. The car was outward bound from Seattle. The car soon thereafter passed respondent and crossed Oberlin street ahead of him and proceeded on to Rainier Beach station. The car was standing at the latter place when respondent reached Oberlin street. Respondent, thinking that the car would go ahead beyond that point, attempted to cross over the tracks. The car, instead of going beyond Rainier Beach station, immediately started back towards Seattle, and ran into the wagon respondent was driving, injuring the respondent and destroying the wagon. The respondent was familiar with the road and with the operation of the cars at that place. He knew the place of crossing and the distances between the stations. The car track was a single track and was operated by a block system at those points. When a car came into the block, a light was turned on, indicating that the car was going out. When the car arrived at the end of the block, which was beyond Rainier Beach station, another light was turned, which would indicate that the car was coming back. These lights were for the use of the railway company to protect cars against each other; but respondent was acquainted with the method of their use, and testified: That, when he came to Oberlin crossing, he saw the car about 230 feet away at Rainier Beach station, standing still; that he saw the light indicating that the car was going on to the end of the block; and that the other light indicating an approaching car was not burning. He thereupon started to cross the track, which, on account of the diagonal position of the track upon the street, required him to travel about 62 feet in order to clear the track. After he started to cross the track, he saw the car coming toward him. He called to the motorman and attempted to get out of the way, but failed to do so. The car struck the wagon in the middle, injuring the respondent and damaging the wagon and team. There was a slight curve in the track between Oberlin street and Rainier Beach station. Respondent testified that he did not know the car was coming toward him until it was within about 100 feet

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of him, and there is disputed evidence that the car was running at from 20 to 25 miles per hour at the time it struck respondent's wagon. There was also evidence to the effect that the motorman could have seen the respondent upon the track in ample time to have stopped the car before running him down.

Appellant argues that, respondent knowing the distance he would have to travel in order to make the crossing, and knowing that the car was coming toward him, or would soon be coming back, he was guilty of negligence in attempting to make the crossing ahead of the car. Appellant relies upon the following cases in support of that position: *Criss v. Seattle Electric Company*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Electric Company*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d'Alene & Spokane Ry. Co.*, 47 Wash. 301, 91 Pac. 839; *Snowdell v. Seattle Electric Company (Wash.)* 103 Pac. 3. The last case cited clearly distinguishes this case from the previous cases, and is in point here to the effect that, where a person sees a car coming at an ordinary rate of speed in a busy street in a populous city on an upgrade half a block away, he is not guilty of contributory negligence as a matter of law in assuming that he may cross a street ahead of the car. In this case the car was 230 feet away from the respondent. It was standing at a station. The indications were that the car was going away from respondent, when he started to make the crossing. These facts make an entirely different case from one where a person drives in front of a moving car which he knows, or ought to know, is coming upon him, and which in all probability will be unable to stop. It is claimed by the appellant that, because the respondent could see the car, he was bound to know that it was coming toward him. It is true he could see it; but, at the time he started to cross the track, he did not know that it was on its way toward him, and the indications were that it was going away from him. While he was on the crossing he probably could have seen the car; but the evidence is that after he had started upon the crossing he could not recede. His only escape was to go ahead, and before he could clear the crossing he was run down. In such cases it is the duty of the company to maintain control of the car and be able to stop. There was therefore no error in denying appellant's motion for a directed verdict.

After the court had instructed the jury to the effect that it was respondent's duty to stop, look, and listen before attempting to cross a track, the instruction continued as follows: "But if you find that the car which struck the wagon and team which plaintiff was driving was standing still at the time when plaintiff started to drive across the car track of the defendant, then in that event plaintiff was not required as a matter of law to stop and listen before starting to drive across said car track, unless you find that the conditions surrounding said car and the acts and conduct of those in charge of said car were such as to indicate to an ordi-

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narly careful and prudent person that said car was in the act of starting and was about to start." Counsel argues that the instruction to the effect that, if the jury found that the car was standing still when respondent started to cross the car track, then respondent was not required to stop and listen unless the surroundings indicated that the car was about to start, was erroneous. We think there is no error in this instruction. If the car was in sight, but was stopped, or was far enough away so that a reasonably careful person would conclude that he might cross in safety, respondent was not guilty of negligence. Respondent had a right to cross the railway at that point. It was a public way. It was his duty to give way to a car which was approaching so near that a reasonably careful person would not attempt to cross in front of it. It was likewise the duty of the appellant to have the car under reasonable control at such places. The duty of the respondent to look and listen was satisfied when he saw the car, and the surroundings indicated that it was stopped or was not coming upon him, and that a reasonably careful person might cross in safety.

It is next argued that the verdict is excessive by reason of the fact that there was no permanent injury proven. The evidence of the doctors was conflicting upon this point. After reading the evidence, we are of the opinion that it is not so excessive as to justify a reduction.

The judgment is therefore affirmed.

RUDKIN, C. J., and CROW, DUNBAR, and PARKER, JJ., concur.

DALE v. DENVER CITY TRAMWAY CO.

(Circuit Court of Appeals, Eighth Circuit, November 1, 1909.)

[173 Fed. Rep. 787.]

Negligence—Imputed Negligence—Negligence of a Chauffeur Imputable to Occupant of Car.*—The negligence of the driver of an automobile is not imputable to an occupant, who is riding as the guest of another and has no control over the movements of the car.

Negligence—Actions—Evidence Admissible under Pleadings.—Under the settled doctrine of the federal courts, a municipal ordinance, to

*For the authorities in this series on the subject of imputed negligence, see foot-note of *Gulf, etc., R. Co. v. Barnes* (Miss.), 32 R. R. R. 620, 55 Am. & Eng. R. Cas., N. S., 620; third head-note of *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311; second head-note of *Peabody v. Haverhill, etc., Ry. Co.* (Mass.), 32 R. R. R. 26, 55 Am. & Eng. R. Cas., N. S., 26; last foot-note of *Currie v. Consolidated Ry. Co.* (Conn.), 31 R. R. R. 525, 54 Am. & Eng. R. Cas., N. S., 525.

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be admissible in evidence in support of a charge of negligence, must be pleaded.

Street Railroads—Collision with Vehicle at Crossing—Negligence.—

A street railway company is not chargeable with negligence, which renders it liable for the killing of a passenger in an automobile by a collision between such machine and a car at a street crossing, where the car was not being run at an excessive speed, and the automobile, which had been proceeding along the same street a short distance ahead of the car, suddenly turned across the track so close to the car that the motorman could not stop before the collision occurred, a movement which he was not bound to anticipate.

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Russell Dale against the Denver City Tramway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert I. Gregg (*R. H. Gilmore*, on the brief), for plaintiff in error.

Howard S. Robertson (*Gerald Hughes*, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This is an action brought by plaintiff to recover damages for the death of his wife, caused by the alleged negligence of the defendant. The facts disclose that Mrs. Dale, a resident of Chicago, Ill., was visiting friends in Denver; that on September 20, 1907, she, with a number of other ladies, was the guest of a friend at a tea party, after which the hostess hired an automobile and took her guests about the city sight-seeing. At about 6 o'clock in the evening they were going west on Eighth avenue in an automobile at a speed of from 15 to 18 miles per hour, until they reached Newport street, which crossed Eighth avenue, when, just as it made the turn to cross defendant's tracks on Newport street, the automobile slackened its speed to 7 or 8 miles per hour. Eighth avenue, at the point in question, was in a sparsely settled portion of the city, and the street but little traveled. The street car track was laid in the center of the avenue, and there was no travel on the avenue on the south of the track; the only travel being upon the north side, in a pathway about 8 feet distant from the outer rail of the street railway track. One of defendant's street cars going west on Eighth avenue traveled some two lengths in the rear of the automobile for about a block before reaching Newport street, at the crossing of which a collision occurred between the automobile and the street car, from which Mrs. Dale sustained injuries resulting in her death.

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The automobile was one having a top; the rear curtain being down, and the side curtains being up. There were seven occupants of the automobile; Mrs. Dale being one of the three persons sitting in the rear seat.

That the chauffeur was guilty of gross negligence in turning the automobile to cross the track, not having taken reasonable precautions to ascertain whether or not the street car was close behind him, does not admit of doubt; but Mrs. Dale, the deceased, was an occupant of the automobile as a guest, and did not have charge of, or control, its movements. The negligence of the chauffeur, therefore, is not imputable to her. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

There is some evidence to the effect that the street car was making a speed of from 18 to 20 miles per hour. On the trial plaintiff offered in evidence a municipal ordinance which granted the right to operate street cars upon certain streets, at a speed not exceeding 15 miles per hour, to the introduction of which defendant objected, for the reason that the ordinance had not been pleaded, and also for the reason that it was incompetent, irrelevant, and immaterial, which objection was sustained. The complaint was based upon the common-law doctrine of negligence. The negligence on the part of the company was charged as running the street car at an excessive rate of speed, and not giving warning of its approach by the sounding of a gong or the ringing of a bell.

The weight of authority and settled doctrine, of the federal courts at least, is that a municipal ordinance, to be admissible in evidence, must in some manner be referred to in the pleadings. *Robinson v. Denver City Tramway Co.*, 164 Fed. 174, 90 C. C. A. 160, and cases cited. We are, however, cited to two recent decisions of the Supreme Court of Colorado, *Griffith v. Denver Consolidated Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, and *Denver Tramway Co. v. Martin*, 44 Colo. 324, 98 Pac. 836, holding that, when the action was not based upon the violation of an ordinance but upon negligence in running the car at an excessive rate of speed, then an ordinance prescribing the rate of speed may be given in evidence, though not pleaded, for the reason that the purpose of a pleading was to set forth ultimate rather than evidential facts; that the ultimate fact proper to be pleaded was the negligent speed of the car; that the speed being in violation of the ordinance was merely an evidential fact to support the ultimate fact. The violation of the terms of the ordinance not alone being negligence *per se*, so as to create a cause of action, but simply a fact or circumstance to be considered in connection with other facts and circumstances in determining whether or not the ultimate fact, to wit, the negligent speed of the car, was established, it is, therefore, urged upon us with much force that the admissibility of the ordinance as evidence in the case involved the construction of pleadings only, and that the federal court, under the

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conformity act, should follow the decision of the state Supreme Court in this regard. We need not now stop to determine the correctness of this view. The ordinance was one adopted by the town of Montclair, in June, 1898, and authorized the Colfax Electric Railway Company to lay its tracks and operate its cars on Colfax avenue, Center avenue, and Geneva avenue of that town. The town of Montclair is now a part of the city and county of Denver, and the evidence discloses that Eighth avenue, the place where the accident occurred, was within the limits of the former town of Montclair; but there is an entire absence of evidence to show that the defendant was operating its cars on Eighth avenue by authority of and subject to the provisions of that ordinance. Hence it was not material to any issue in the case, and the objection to its introduction was properly sustained.

At the close of all of the evidence, upon motion of defendant, the court directed a verdict for the defendant. This is alleged as error. There was no whistle upon the street car, but a gong, and we think it clear from the evidence that the motorman sounded the gong at Oneida street (being the first street back from Newport); that he had proper control of his car, and as soon as the automobile turned to cross the track he immediately put on the brake, released the current, and sounded the gong, all of which was ineffectual, as it was but a moment between the time the chauffeur turned his car to cross the track and the collision. The speed at which the street car was going was not, considering the sparsely settled portion of the city and the small amount of travel upon the streets in that section, a negligent rate of speed. While the motorman knew and saw that the automobile was traveling ahead of him in the same direction, he was not bound to anticipate that the automobile would attempt to cross the track without reasonable precautions being taken to ascertain the approach of the car. *Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; *Atlanta, etc., R. R. Co. v. Lovelace*, 121 Ga. 487, 49 S. E. 607; *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; *Macon & T. S. Electric St. Ry. v. Holmes*, 103 Ga. 655, 30 S. E. 563.

We think there was a failure to show actionable negligence on the part of defendant, and the judgment is affirmed.

GIBSON v. BESSEMER & L. E. R. CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 194.]

Appeal and Error—Assignments of Error—Sufficiency.—On appeal from the superior court, assignments of error alleging error of the trial court, and not of the superior court, are insufficient.

Appeal and Error—Assignments of Error—Sufficiency.—On appeal from the superior court, an assignment of error specifying error by such court in not sustaining the assignments of error filed therein, but including eight assignments under one head, instead of assigning the overruling of each assignment, is insufficient.

Livery Stable Keepers—Contract with Livery Stable Keeper.—A contract between a livery stable keeper and one who hires a horse and carriage from him constitutes a bailment.

Negligence—Joint Tort-Factors—Imputed Negligence.*—Where the owner of a livery stable lets out a horse and buggy, and the horse is killed at a grade crossing by the joint negligence of the bailee and the railroad company, the negligence of the bailee is not to be imputed to the owner of the horse, so as to prevent him from recovering from the railroad company.

Railroads—Accident at Crossing—Question for Jury.—Where the evidence shows that an engine was running at about 20 miles an hour, that it ran 300 or 400 feet after it hit the horse at a crossing, and there was evidence that there was no signal given, the question of the negligence of the railroad is for the jury.

Appeal from Superior Court.

Action by Martin L. Gibson against the Bessemer & Lake Erie Railroad Company. From a judgment of the superior court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Lev. McQuiston and *C. L. McQuiston*, for appellant.

John R. Henninger, for appellee.

POTTER, J. This was an action of trespass brought in the court of common pleas of Butler county by Martin L. Gibson against the Bessemer & Lake Erie Railroad Company, to recover damages for the killing of plaintiff's horse and for injuries to his buggy and harness, alleged to have been caused by the negligence of defendant's servants. Upon appeal to the superior court the judgment was affirmed, and from this judgment of the superior court the present appeal was taken.

*See foot-note of preceding case.

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It appears that the plaintiff was the owner of a livery stable in the borough of Butler. On June 25, 1906, he let for hire a horse and buggy to one Lantz, who, with a companion named Nicholas, drove through the town. In crossing the tracks of the defendant company where they intersect at grade with Main street, a public street of the borough, the horse and buggy were struck by a tender attached to one of the defendant's engines which was running backward at the time. The horse was killed, and the buggy and harness badly damaged. Both Lantz and Nicholas admitted on cross-examination that they did not stop before driving upon the railroad track. They both testified that they were struck by the tender of an engine, running backward at a speed of 15 or 20 miles an hour, that there was no bell rung nor whistle sounded, nor warning of any kind given them of the approach of the engine, and that there was no flagman or electric bell at the crossing. Another witness, George Howard, who was on the opposite side of the crossing and saw the locomotive approaching, testified that he did not hear any whistle blown or bell rung, and saw no flagman. Both the trial court and the superior court held that the driver of the buggy was by his own admission guilty of contributory negligence, but that such negligence was not imputable to the plaintiff, and did not affect his right to recover for injuries to his property caused by defendant's negligence.

We must again call the attention of counsel to the proper form of assignments of error in an appeal from the judgment of the superior court, as recommended in *Mellick v. Penna. R. R. Co.*, 203 Pa. 457, 53 Atl. 340. In the present case the first, second, and third assignments merely allege error upon the part of the trial court, and not by the superior court. The fourth assignment does specify error by the superior court in not sustaining the assignments of error filed in that tribunal, but it includes eight assignments under the one head, instead of assigning the overruling of each assignment separately. This is not in accordance with the practice recommended in *Mellick v. Penna. R. R. Co.*, 203 Pa. 457, 53 Atl. 340, and is a violation of rule 29, which requires each error relied on to be specified particularly and by itself. The last two assignments do allege error, in the affirmance by the superior court of the judgment of the court of common pleas.

As to the main question raised—the relation between a livery stable keeper and one who hires from him a horse and carriage—we have no doubt but that it is that of bailor and bailee, and that the contract between them for the hire and use of the chattels constitutes a bailment. In 1 Bouvier's Law Dict. (Rawle's Ed. 1897) 213, bailment is defined as "a delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished." In Schouler on

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Bailments (3d Ed. 1897) § 130, it is said: "In the bailment for hired use the bailor, technically styled the 'letter,' shifts over into the party entitled to recompense, while the hirer, in turn becomes bailee. This bailment * * * contemplates the temporary beneficial use of a chattel which the bailee must eventually return. * * * Our reports furnish few cases of consequence under this head, save in the instance of hiring a horse or carriage." In section 137 the author, still discussing bailments for hire, further says: "Let us take, for example, a case by far the most familiar under this head to English and American courts, namely, that of a horse hired for use." In the text-books treating of the law of bailments, constant reference is made to contracts for the hiring of horses and vehicles, as illustrating the contract of bailment. See, for example, Edwards on Bailments (3d Ed. 1893) § 373, and Van Zile on Bailments (2d Ed. 1908) § 119.

The weight of authority also seems to sustain the proposition that the negligence of a bailee for hire is not to be imputed to the bailor. In the work just quoted (Van Zile), one of the latest on the subject, in section 128, it is said: "The bailee does not stand in the place of the bailor; he does not represent him in such a relation as would render the bailor liable for his negligent acts, or for the negligent acts of his servants or agents, and so, while in an action brought by the bailee against third parties for injuries to the property, the third party may defend in the action upon the ground of contributory negligence upon the part of the bailee, his servants, or agents, in an action by the bailor, who is the owner of the property, against a third party for injury to the bailment, the negligence of the bailee, or his servants or agents, would be no defense, and would not prevent a recovery for the reason that such negligence is not imputable to the bailor."

And in Edwards on Bailments (3d Ed. 1893) § 392, it is said: "The hirer of wagons, or carriages and horses, receiving them into his custody to be used by him at his pleasure, becomes a bailee, and is in no sense a servant of the owner. He is responsible to the owner for the reasonable care of them, and to third persons for any negligence of his servants in the use of them. He is liable to third persons to the same extent as if he were the actual owner of the vehicles and teams used by him." And again, in 1 Thompson on Negligence (1901) § 512, it is said: "Unless the principles upon which the courts have at last settled have been grossly misconceived, the negligence of a bailee or his servants is not imputable to his bailor." As far back as the case of *Bard v. Yohn*, 26 Pa. 482, Justice Knox stated the law as follows (page 489): "If one lets or hires to another a horse to be used exclusively for the purposes of the latter, the owner of the horse is in no wise responsible for the negligent manner in which the horse may be used."

There is a difference where the owner sends a driver to manage

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and control the team and vehicle, for in so doing the owner retains the control, and may well be held accountable for the action of the driver, his servant and agent. But in the present case no driver was furnished, and the hirer assumed the care and control of the horse. There was no relation of master and servant, or of principal and agent, between the hirer and the liveryman, and the latter cannot be held responsible for the negligence of the former. Each must recover in his own right, if at all, and each must stand upon his own ground. Had Lantz, the hirer, brought suit and shown negligence by the defendant, and no negligence upon his own part, he could have recovered for damage to himself, but not for damage to the horse or vehicle. His right of action depended in no way upon that of the present plaintiff, nor does the right of recovery in the present action depend upon the right of the bailee to recover.

Counsel for appellant further contend that the plaintiff did not present sufficient evidence of negligence to justify the submission of the case to the jury. The record shows that plaintiff relied upon three witnesses to establish negligence. One testified, in substance, that the horse was struck by the tender of an engine backing up towards the yard. The engineer gave no signal, did not ring the bell, and did not blow a whistle. There was no watchman at the crossing, nor any electric bell. There is considerable travel at the crossing. It is one of the busiest streets in town. The engine was traveling, in witness's judgment, 15 or 20 miles an hour. It was going so fast that it ran 300 or 400 feet after they hit the rig before they could get it stopped. Another witness said that he was in the buggy with Lantz; that there was no warning given of the approach of the engine to the crossing, either by blowing the whistle or ringing the bell, and that there was no flagman nor electric bell at the crossing. The crossing was on the extension of Main street in the borough of Butler, at a point where there is a great deal of travel. The engine was traveling fast, and it went on after it struck the horse 300 or 400 feet before it came to a stop. Another witness testified that he was on the opposite side of the crossing, watching the locomotive as it approached, and heard no whistle or bell. It thus appears that the evidence for the plaintiff was not merely negative. It was positive, and was given by witnesses who alleged that they were in a position to hear, and were listening and would have heard, had the signals been given. This, in connection with the testimony as to the speed of the locomotive, was sufficient to take the case to the jury, on the question of defendant's negligence. The credibility of the witnesses was for the jury.

The assignments of error are all dismissed, and the judgment of the superior court is affirmed.

ANSPACH v. PHILADELPHIA & R. RY. CO.

(Supreme Court of Pennsylvania, Oct. 11, 1909.)

[74 Atl. Rep. 373.]

Railroads—Accident at Crossing—Contributory Negligence.—In an action for the death of plaintiff's testate at a railroad crossing, that he was ignorant of the country and did not know of the existence of the crossing does not excuse his failure to stop, look, and listen before going on the track.

Railroads—Accident at Crossing—Failure to Signal—Evidence.*—Where witnesses in position to know testified that signals were given by a train approaching a crossing, negative evidence that certain witnesses did not hear the signals is insufficient to show negligence on the part of the railroad company.

Railroads—Accident at Crossing—Excessive Speed—Evidence.—Evidence held insufficient to show negligence in running a train at an excessive speed over a country crossing in the nighttime.

Appeal from Court of Common Pleas, Schuylkill County.

Action by Julia Anspach against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John F. Whalen, for appellant.

James B. Rcilly, *W. J. Whitehouse*, and *C. A. Whitehouse*, for appellee.

POTTER, J. In this action Julia Anspach seeks to recover damages for the death of her husband, alleged to have been caused by the negligence of the defendant. The plaintiff's husband, John Anspach, resided at New Philadelphia, Schuylkill county. He was a miner by occupation, and was also constable of the borough. On the morning of November 19, 1903, at an early hour, he left his home to join two neighbors, for the purpose of going on a hunting trip to the eastern part of the county. They rode in a buggy, Anspach and one of his companions upon the seat, and the other, who was driving seated on their laps. On the way they were joined by four other men, who rode behind them in another conveyance. In order to reach the hunting grounds, they passed through the borough of New Ringgold, about 10 miles southwest of New Philadelphia. At this point the road upon which they were traveling crossed at grade, and at right angles, the track of the Little Schuylkill Railroad, a branch of the Phil-

*See first foot-note of *Louisville & N. R. Co. v. Molloy's Adm'r* (Ky.), 27 R. R. R. 500, 50 Am. & Eng. R. Cas., N. S., 500.

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adelphia & Reading, which runs from Port Clinton to Tamaqua; the crossing being 70 feet south of a railroad station, and being that of an ordinary country road. According to the testimony of the companions of Anspach, they were not aware of the location of the railroad, and were not on the lookout, but drove straight to the crossing, without stopping, or looking or listening for the approach of a train. Just as the horse reached the track, a freight train going south reached the crossing. The horse was turned by the driver, or veered to one side of its own accord, and sustained little injury; but the buggy was struck and demolished, its occupants were thrown out, and Anspach fell under the wheels of the train, and received injuries from which he died in a few hours. The train was made up of an engine and 42 freight cars and was running downgrade, by gravity, at a speed, according to the engineer, of 10 or 12 miles an hour. It carried a burning headlight, and two other lights on the engine, and approached the crossing on a straight track from a point 2,000 feet distant. There is ample evidence to show that the whistle was blown several times before the train reached the crossing, and that the bell was run continuously from a point about 1,200 feet above the crossing down to the moment of the collision. The usual station equipment of lamps for a country station was in place and burning, such as a large lamp in front, semaphore lights a short distance from, and opposite the station, and a light in the operator's office. Yet Anspach and his companions apparently neither heard nor saw anything to indicate danger to them until they drove almost into the approaching engine. The accident occurred about 6 o'clock in the morning of a November day, while it was yet dark. Not so dark, however, but that the travelers could, as they testified, distinguish teams and vehicles which they met upon the road.

The first question which arises in the consideration of this case is whether there is any evidence of any neglect by the defendant company of any duty which it owed Anspach. Whether or not he was acquainted with the locality was not definitely shown. His companions testified that they did not know the location of the railroad, and for that reason they did not stop, look, or listen as they approached the track. But the defendant company was not to blame for any ignorance in this respect upon the part of Anspach. It was not its duty to hunt him up and inform him of the location of its line. Had the approach of these parties been made in daylight, no excuse could have been offered for their failure to observe the railroad and take the usual precautions against danger. Nor can anything be fairly predicated in favor of Anspach and his companions because they were traveling in the darkness. If they chose to use the highway at night, they incurred the risk of encountering such obstacles as might lawfully be found along the line of travel. The railroad was where it

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had the lawful right to be, either by day or by night. It is plainly the duty of parties wishing to travel over an unknown road at night to inform themselves in advance of possible dangers that may beset their way. Certainly in the present case the defendant company cannot justly be held responsible for the results of the ignorance of Anspach and his companions. The increased risk of traveling by night was one which they assumed, and it is not to be cast upon the defendant company.

Undoubtedly it is the duty of a railroad company in approaching a crossing in a rural community to run at a reasonable rate of speed, and to give proper warning by means of signal, or the blowing of a whistle or the ringing of the bell. In this respect the evidence is clear and convincing that every reasonable requirement was met. The evidence of the train crew is that the whistle was blown several times, and at three distinct places, as the train slowly approached the station and the crossing. The bell was also rung continuously for quite a distance, and for some time before the collision. There was no testimony on the part of the plaintiff that the whistle was not blown or the bell rung. The witnesses on that point for plaintiff merely said they did not hear the whistle or bell. Negative testimony of this character, by those who did not hear, as against the positive, affirmative testimony of witnesses who did hear, and who were in a position to know, is not enough to make out a charge of negligence. *Hauser v. Central R. R. Co.*, 147 Pa. 440, 23 Atl. 766. We held in *Newhard v. Penna. R. R. Co.*, 153 Pa. 417, 26 Atl. 105, 19 L. R. A. 563, where 11 witnesses testified that they heard the whistle, as against plaintiff's testimony that he did not hear it, that the court must treat the allegation that the whistle was blown as a fact "because of proof that convinces an unprejudiced mind beyond a reasonable doubt." In *Knox v. P. & R. Ry. Co.*, 202 Pa. 504, 52 Atl. 90, we held, as set forth in the syllabus, that "the testimony of one witness, a passenger, that a train approached a crossing without ringing a bell or sounding a whistle, contradicted by the engineer, fireman, conductor, and brakeman, is insufficient to carry a case to the jury on the question of the railroad company's negligence." And in *Keiser v. Lehigh Val. R. R. Co.*, 212 Pa. 409, 61 Atl. 903, 108 Am. St. Rep. 872, we again held as summed up in the syllabus that "in a railroad grade crossing accident case the negative testimony of nine witnesses that they did not hear the whistle blown nor the bell rung on a stormy and windy night, amounting only to a scintilla, cannot prevail against the overwhelming and positive testimony of fourteen witnesses, which conclusively established the fact that these duties were performed. In such a case the trial judge is warranted in giving binding instructions to the jury to return a verdict in favor of the defendant." It further appears definitely that the train was not running at a rate of more than twelve miles per hour, and was under such

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good control, that it was brought to a standstill at the crossing, when not more than half of the train had passed. So that in none of these things does it appear from the evidence that there was any neglect of duty upon the part of the defendant company. The trial judge would have been justified in taking the case from the jury for want of sufficient evidence to justify a verdict against the defendant.

In addition to this, we can find nothing in the evidence to show any reasonable excuse for the neglect of Anspach and his companions to take notice of the approach of the train, as they drove to meet it, at the crossing. If they did not see the signal lights at the station, the headlight of the approaching locomotive, and one upon an engine standing near by, nor hear the repeated blasts of the whistle, and the ringing of the bell, and the rumbling of a long train of freight cars, then indeed must they have made but little use of their senses.

A careful examination of the evidence in this case leads us to the irresistible conclusion that no negligence upon the part of the defendant company was shown, and that the unfortunate accident which occurred resulted from the heedlessness of the parties who suffered from it. The responsibility for disposing of this case should have been assumed by the court.

The assignments of error are sustained, and the judgment is reversed.

SCHANNO v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, Oct. 15, 1909.)

[122 N. W. Rep. 783.]

Street Railroads—Negligence—Failure to Look and Listen—Question of Law.*—The failure of a person to look and listen before attempting to cross a street railway track is not, as a general rule, negligence per se; but when the undisputed evidence establishes exceptional circumstances, which so conclusively indicate negligence in

*For the authorities in this series on the question whether the failure of a highway traveler to stop, look, or listen for trains before attempting to cross the tracks of a steam railroad constitutes contributory negligence per se, see *Louisville & A. Ry. Co. v. Ratcliffe* (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255 (failure to look and listen is negligence); *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48 (failure to look and listen will not necessarily bar recovery); *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 32 R. R. R. 638, 55 Am. & Eng. R. Cas., N. S., 638 (if by proper use of his faculties a highway traveler can avoid being struck by a train, he is guilty of negligence precluding recovery in not using them); *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739

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failing to look or listen that there can be no reasonable basis for drawing a different conclusion, the question is one of law.

Street Railroads—Collision—Contributory Negligence.—Evidence considered, and held, that the trial court correctly dismissed this action on the ground that the plaintiff's contributory negligence had been conclusively established.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Olin B. Lewis, Judge.

Action by Charles W. Schanno against the St. Paul City Rail-

(failure of one about to drive across railroad crossing to stop, look, and listen was not of itself sufficient to prevent recovery for his death); *Liabraaten v. Minneapolis, etc., Ry. Co. (Minn.)*, 30 R. R. R. 178, 53 Am. & Eng. R. Cas., N. S., 178 (mere fact that passenger in vehicle could, had he looked or listened, have seen an approaching train is not conclusive that he was negligent in failing to do so); *Peck v. Oregon Short Line R. Co. (Utah)*, 4 R. R. R. 358, 27 Am. & Eng. R. Cas., N. S., 358 (question for jury where failure to stop); *Selensky v. Chicago G. W. Ry. Co. (Iowa)*, 7 R. R. R. 756, 30 Am. & Eng. R. Cas., N. S., 756 (question for jury); *McGoran v. New York, etc., R. Co. (R. I.)*, 9 R. R. R. 367, 32 Am. & Eng. R. Cas., N. S., 367; *Mobile & O. R. Co. v. Colver (C. C. A.)*, 1 R. R. R. 199, 24 Am. & Eng. R. Cas., N. S., 199 (direction of verdict for defendant); *Willfong v. Omaha & St. L. R. Co. (Iowa)*, 2 R. R. R. 792, 25 Am. & Eng. R. Cas., N. S., 792 (failure to stop, look and listen is not negligence as matter of law); *Louisville & N. R. Co. v. Price's Adm'r (Ky.)*, 10 R. R. R. 679, 33 Am. & Eng. R. Cas., N. S., 679 (Kentucky rule); *Ihrig v. Erie R. Co. (Pa.)*, 15 R. R. R. 159, 38 Am. & Eng. R. Cas., N. S., 159 (Pennsylvania rule); *Dwajakowski v. Central R. Co. (N. J.)*, 9 R. R. R. 374, 32 Am. & Eng. R. Cas., N. S., 374 (recovery prevented by failure to look); note, 12 Am. & Eng. R. Cas., N. S., 444, et seq.; *Atchison, etc., R. Co. v. Holland (Kan.)*, 12 Am. & Eng. R. Cas., N. S., 476 (contributory negligence a question of law); *Gahagan v. Boston & M. R. R. (N. H.)*, 23 Am. & Eng. R. Cas., N. S., 141 (direction of verdict for defendant); *Ritzman v. Philadelphia & R. R. (Pa.)*, 12 Am. & Eng. R. Cas., N. S., 444 (negligence per se); *Conkling v. Erie R. Co. (N. J.)*, 15 Am. & Eng. R. Cas., N. S., 61 (failure to look and listen is contributory negligence); *Smith v. Boston & M. R. R. (N. H.)*, 19 Am. & Eng. R. Cas., N. S., 320 (failure to look and listen not contributory as matter of law); *Kallmerten v. Cowen (C. C. A.)*, 23 Am. & Eng. R. Cas., N. S., 352 (failure to look precluding recovery for death); *Illinois Cent. R. Co. v. Jones (C. C. A.)*, 15 Am. & Eng. R. Cas., N. S., 16 (not negligence as matter of law); *Bond v. Lake Shore & M. S. Ry. Co. (Mich.)*, 12 Am. & Eng. R. Cas., N. S., 447 (failure to stop and listen); *Coppuck v. Philadelphia W. & B. R. Co. (Pa.)*, 15 Am. & Eng. R. Cas., N. S., 68 (failure to stop and look is negligence); *Lewis v. Long Island R. Co. (N. Y.)*, 18 Am. & Eng. R. Cas., N. S., 1 (failure to stop not negligence per se); *Pyle v. Clark (Utah)*, 5 Am. & Eng. R. Cas., N. S., 156 (whether negligence in failing to look and listen is a question of law or fact); *Davis v. Concord & M. R. R. (N. H.)*, 19 Am. & Eng. R. Cas., N. S., 68 (question for jury whether it is negligence to fail to look or listen.)

For the authorities in this series on the subject of the precautions required of a highway traveler before he attempts to cross railroad tracks, see fifth foot-note of *Louisiana & A. Ry. Co. v. Ratcliffe (Ark.)*, 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255.

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way Company. Judgment of dismissal. From an order denying motion for new trial, plaintiff appeals. Affirmed.

Walter L. Chapin, for appellant.

W. D. Dwyer, for respondent.

START, C. J. On the morning of May 2, 1908, at about 9:30 o'clock, the plaintiff, while driving in a covered milk wagon along Selby avenue, near the point where it crosses Lexington avenue, in the city of St. Paul, was run into by the defendant's street car. The wagon was wrecked, the milk spilled, and the plaintiff personally injured to some extent, by reason of the collision, and he brought this action in the district court of the county of Ramsey to recover the damages so sustained on the alleged ground that the collision was caused by the alleged negligence of the defendant. On the trial of the action, and at the close of the plaintiff's case, the trial court, on motion of defendant, dismissed the action on the ground that the evidence showed as a matter of law that the plaintiff was guilty of contributory negligence. He appealed from an order denying his motion for a new trial.

The alleged negligence on the part of the defendant was that the car was carelessly operated, and the evidence was sufficient to take the case to the jury on the question of the defendant's negligence. The sole question, then, for our consideration, is whether the undisputed evidence conclusively establishes the plaintiff's contributory negligence in the premises. The evidence tended to establish these facts: The grade of Selby avenue rises at the rate of 4 feet to the 100 for 400 feet next west of the point of the collision, over which the defendant operated by electricity two or more lines of street cars. Cars coming from the west were accustomed for some years to run down this grade frequently and rapidly, and at a rate of speed three or four times greater than the plaintiff was accustomed to drive his team thereon, all of which he well knew; for in the prosecution of his business of delivering milk to his customers he was accustomed to drive daily along Selby avenue at this point. On the morning in question he was seated in his milk wagon, the body of which was 8½ feet long and so inclosed that when he was seated in the wagon he could see out of the rear thereof only through a window 6 by 10 inches, and out of the sides of the wagon by leaning forward and looking through glass panels. He was, on the morning in question, driving down Selby avenue parallel with and on the south side of defendant's railway track, going east toward Lexington avenue. When he reached a point 400 feet therefrom, where the grade begins to descend, he looked through the rear window of his wagon and saw a car coming two or three blocks away. He kept on down the grade, without again looking for the car, although he knew that it was following him, driving his team at the rate of five miles an hour. He thought the car was far

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enough away so that he could make the crossing as usual, and gave no further thought to the car. When he reached Lexington avenue he started at an angle across defendant's railway track, to go north along that avenue, when his wagon was struck and wrecked by the oncoming car. His horses were not injured. He did not hear any ringing of bells or other warning from the car behind him. On his cross-examination he testified as follows: "Q. And you thought on the top of the hill, 'Now, there is time for me to cross this track and get down the hill.' That was your idea? A. Yes, sir. Q. And you were interested with Mr. Schmidt talking on other subjects? A. Yes, sir. Q. And as you came down the hill, and down near Lexington avenue here, driving along about five miles an hour— A. About five miles an hour, I should think. Q. Of course, you didn't look for a car then? A. No, sir. Q. Didn't pay any attention at all as to the car coming, did you? A. No, sir. Q. And the first you knew was that your wagon was running along and tipping over? A. Yes, sir."

The law applicable to these facts is well settled. The general rule is that the failure of a person to look and listen before attempting to cross a street railway track is not negligence *per se*; but when the undisputed evidence establishes exceptional circumstances, which so conclusively indicate negligence in failing so to look or listen that there can be no reasonable basis for drawing a different conclusion, the question is one of law. *Shea v. Railway Co.*, 50 Minn. 395, 52 N. W. 902; *Watson v. Railway Co.*, 53 Minn. 551, 55 N. W. 742; *Hickey v. Railway Co.*, 60 Minn. 119, 61 N. W. 893; *Terien v. Railway Co.*, 70 Minn. 532, 73 N. W. 412; *Shindelus v. Railway Co.*, 80 Minn. 364, 83 N. W. 386; *Smith v. Railway Co.*, 95 Minn. 254, 104 N. W. 16; *Bremer v. Railway Co.* (Minn.) 120 N. W. 382. We are of the opinion, upon a full consideration of the undisputed evidence, that this case falls within the exception to the general rule, and that the trial court correctly dismissed the action on the ground that the plaintiff's contributory negligence had been conclusively established.

Order affirmed.

CAMPBELL v. CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Minnesota, May 28, 1909.)

[121 N. W. Rep. 429.]

Railroads—Accident at Crossing—Negligence—Contributory Negligence.—Plaintiff saw a horse and wagon without a driver approach the railroad tracks at a constantly used crossing of a busy city street. He took hold of the reins suspended from the top of the vehicle. Defendant's railroad train, while the engine whistle was being blown and the train was running at the rate of 35 miles an hour, came suddenly into view around a sharp curve some 200 feet away. The horse became frightened, plunged forward, and jerked plaintiff on the track. The oncoming train struck him, and produced the injuries for which the jury awarded damages. Its verdict is sustained, despite objection based on the absence of proof of defendant's negligence, on plaintiff's contributory negligence, on the instructions given by the trial court, and on other grounds.

Railroads—Accidents at Crossings—Contributory Negligence—Instructions.*—One who goes near enough to a railway track to be in danger from any cause is required by law to exercise due care to avoid harm. This rule does not, however, amount to a hard and fast requirement that such a person must stop, look, and listen, and continue to look under all circumstances and at all times; nor is such person bound to anticipate negligence on the part of persons operating trains on such a track.

(Syllabus by the Court.)

Appeal from District Court, Mower County; Nathan Kingsley, Judge.

Action by Hiram Campbell against the Chicago Great Western

*For the authorities in this series on the subject of the precautions required to be taken by a highway traveler before attempting to cross railroad tracks, see fifth foot-note of *Louisville & A. Ry. Co. v. Ratcliffe* (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255.

For the authorities in this series on the subject of the duty of a highway traveler to look again for trains or street cars, just before he attempts to cross railroad tracks, see last paragraph of foot-note of *New York Cent., etc., R. Co. v. Maidment* (C. C. A.), 32 R. R. R. 681, 55 Am. & Eng. R. Cas., N. S., 681; second head-note of *Grimm v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 32 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665; fourth foot-note of *Kern v. Des Moines City Ry. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29; last paragraph of first foot-note of *Clemons v. Chicago, etc., R. Co.* (Wis.), 31 R. R. R. 491, 54 Am. & Eng. R. Cas., N. S., 491.

For the authorities in this series on the question whether a person injured though the negligence of another had the right to assume that latter had performed or would perform the duties owing to the former, see first foot-note of *Rundgren v. Boston & N. St. R. Co.* (Mass.), 32 R. R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685.

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Railway Company. Verdict for plaintiff. From an order denying motion for judgment *non obstante* or a new trial, defendant appeals. Affirmed.

Briggs, Ainsworth & Markham and *Lafayette French*, for appellant.

S. D. Catherwood and *Dunn & Carlson*, for respondent.

JAGGARD, J. Plaintiff saw a wagon with a horse attached, but without a driver, approaching defendant's railroad tracks at a constantly used crossing of a busy city street. As the horse was about to stop on the tracks, plaintiff took hold of the reins, which were suspended from the top of the wagon by a hook. At this point, if he had looked, he could not have seen up defendant's tracks towards the north more than about 200 feet, because the tracks there curved sharply as they passed "a little wooden building" about that distance from the crossing. While plaintiff was backing this horse away from the railroad track, and when he was safe under ordinary circumstances, defendant's train, running 35 miles an hour, burst into view some 200 feet to the north. Sharp blasts of the whistle were blown, the horse became frightened, plunged forward, jerked plaintiff upon the track, and ran on across the tracks. Defendant's train hurled plaintiff aside and inflicted the injury for which recovery is here sought. The jury found a verdict for him in the sum of \$1,500. This appeal was taken from the order of the trial court denying the defendant's usual motion in the alternative.

1. The facts have been stated, as they must be under the circumstances, in accordance with the construction of the testimony introduced most favorable to the plaintiff. On argument in this court, defendant's negligence was frankly admitted for the purposes of this appeal. The speed at which the train was running the jury might have found was wrongful. It was contended, however, that the affirmative testimony that the bell was ringing so overbalanced plaintiff's testimony that he did not hear the ringing of the bell as to exclude this consideration from the determination of negligence. This, however, is a consideration which, under the present circumstances, affects plaintiff's contributory negligence, not defendant's actionable wrong.

2. The gist of this appeal upon the merits is that plaintiff was shown to have been guilty of contributory negligence as a matter of law, or that the circumstances in connection with this contributory negligence were such as to require a new trial to be granted. We are of opinion that the trial court properly refused to accept either of these views. Plaintiff was engaged in caring for the property of another, then in a position of peril to itself and of probable danger to defendant's property and to the passengers it was engaged from time to time in transporting. According to his testimony—which for present purposes must be assumed to

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be true—he was not standing on the railroad track, nor near enough to be struck by the train, before the train came into view. He did not intend to go dangerously near it. He expected to back the horse to a place of safety.

Plaintiff was not required to exercise the care of a person approaching and about to cross the railroad tracks. It will be assumed that, under the circumstances of this case, plaintiff was within the rule of law requiring one who goes near enough to a railroad track as to be in danger from any cause to exercise due care to avoid harm. That obligation must, however, vary with circumstances. It does not amount to a hard and fast requirement that such persons must stop, look, and listen, and continue to look at all times and under all circumstances. Plaintiff's testimony on direct examination as to looking and listening the jury might have found exonerated him from contributory negligence. His cross-examination was not so favorable to his interests. The result was for the jury.

The jury might properly have found from the testimony that plaintiff had glanced up the track at one time and had seen nothing. The train would have covered in four or five seconds the distance he could have seen it, because of the curve previously stated. The duty to exercise care is in the nature of things continuous, but due vigilance did not require plaintiff to keep his eye fixed in the direction from which the train came. If stress be laid upon the signals which defendant insists plaintiff should have heard, then the emergency element becomes conspicuous. In any view, the situation of the horse and the vehicle constituted to a limited extent a distraction of his attention, the effect of which as a justification was for the jury.

Finally, plaintiff put himself in no position of danger. He could have safely accomplished his humane purpose if it had not been for the negligence of the defendant. He did not anticipate, and as a matter of law was not required to have anticipated, that negligence. He was not bound to have foreseen that defendant would run its train around the sharp curve which prevented its observation at an unlawful and dangerous rate of speed across a much used thoroughfare. He had the right to rely upon the exercise of commensurate care on defendant's part, in exposing either persons or property to unnecessary and great peril from so dangerous an instrumentality as a rapidly moving train. On principle, the question of contributory negligence was for the jury. Its conclusion is sustained by the record.

The authority most nearly resembling the present case is *Lorenz v. Railroad Co.*, 115 Iowa, 377, 88 N. W. 835, 56 L. R. A. 752. There deceased was struck by a train on defendant's road at a street crossing. At the time he was attempting to head off and drive back a cow. In considering the question of contributory negligence, McClain, J., said: "In determining what con-

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stitutes contributory negligence, * * * only whether the person injured did use the care which the circumstances required of him. Now, while the rule is well settled in this state, and generally elsewhere, that it is contributory negligence for a person to go upon a railway track without looking or listening to ascertain whether there is danger from an approaching train, yet his duty in that respect is to exercise the care which reasonably prudent persons would exercise under the circumstances. The duty to look and listen is not an absolute one, but one the exercise of which is dependent on conditions." A verdict for plaintiff was affirmed.

The authorities cited by defendant to sustain the contention that "the obligation to exercise care is not alone upon one who expects to cross a railway, but is equally upon one who goes near to it, so as to be in danger from any cause," without exception involve circumstances so different from the circumstances in the case at bar that they are not controlling. In *Flagg v. Railroad Co.*, 96 Mich. 30, 55 N. W. 444, 21 L. R. A. 835, plaintiff, instead of alighting, remained in a wagon to which a young horse was attached while a train was approaching. In *Moore v. Railroad*, 126 Mo. 265, 29 S. W. 9, plaintiff drove a team of horses, which he knew were easily frightened by the cars, on defendant's right of way, while there was nothing to prevent him from driving down a safe street. In *Railroad v. Taliaferro* (Tex. App.) 19 S. W. 432, plaintiff attempted to drive in front of an engine which he saw coming. In *Olson v. Railroad*, 81 Wis. 41, 50 N. W. 412, 1096, plaintiff left, unhitched and unattended, within 19 feet of the track, a young, high-lived team of horses. In *Hargis v. Railway Co.* 75 Tex. 19, 12 S. W. 953, plaintiff, having crossed the track in safety, voluntarily and unnecessarily stopped. In *Railroad v. Buckner*, 28 Ill. 299, 81 Am. Dec. 282, a deaf person drove an unmanageable horse across a track and when a train was approaching. In *De Ville v. Railroad*, 50 Cal. 383, plaintiff left a span of horses unhitched at train time. In *Cornell v. Railroad*, 82 Mich. 495, 46 N. W. 791, plaintiff drove a young horse along a street railway for the purpose of testing the horse. In *Railroad v. Schmidt*, 81 Ind. 264, plaintiff attempted to lead his horse across a track in front of an engine. In these cases plaintiff's own conduct initiated the peril. In the case at bar the plaintiff had no connection with the original presence of the horse and wagon on the track. He should not be penalized for undertaking an errand of mercy.

3 Defendant has laid especial stress upon the instruction by the court to the effect that as plaintiff was not on the crossing, but was jerked upon it by the action of the horse, then plaintiff was not negligent, and defendant was liable if it was negligent. If stress were laid upon the emergency feature of this case, it might be that this instruction

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was correct in itself. The charge of the trial court must be approved, however, on other grounds; for, after the court had practically completed its charge, it required whether counsel desired to call attention to other matters. Counsel for the plaintiff then suggested that the ruling as to plaintiff's contributory negligence in the respect here involved was "stated a little broader than might be warranted." The court thereupon charged that the plaintiff was bound to exercise ordinary care at all times up to the time of the accident, and that if he had notice or knowledge that the train was approaching, or in the exercise of ordinary care should have taken notice, it would have been negligent for him to have gone upon the railroad track, and that in such event he would be guilty of contributory negligence and could not recover. This instruction appears to be as favorable to defendant as properly might be. If defendant thought otherwise, it should have then pointed out its impropriety to the court.

We have examined the other assignments of error, and have found them to be without merit.

Affirmed.

WEST v. DETROIT UNITED RY.

(Supreme Court of Michigan, Dec. 30, 1909.)

[123 N. W. Rep. 1101.]

Death—Action for Wrongful Death—Nature of Action.—"Instantaneous Death."—Where decedent was dead when taken from beneath the car which struck him, though he lived some 15 minutes after being struck, death was "instantaneous," so as to constitute a cause of action under the so-called "death act" (Comp. Laws, § 10,427), rather than under the survival act (Comp. Laws, § 10,117).

Street Railroads—Injury of Person at Crossing—Contributory Negligence—Evidence.—Evidence held to show that decedent was guilty of contributory negligence in attempting, without any precaution, to cross a track ahead of a car approaching at full speed.

Street Railroads—Injury of Person at Crossing—Evidence of Contributory Negligence.—In an action for the death of a person at a crossing, evidence of a regulation or custom as to where the cars should stop at that crossing is admissible as bearing on decedent's negligence.

Error to Circuit Court, Wayne County; Harry A. Lockwood, Judge.

Action by Mary F. West, administratrix of the estate of Charles L. West, deceased, against the Detroit United Railway. Plaintiff had judgment, and defendant brings error. Reversed.

On August 16, 1907, the day on which plaintiff's decedent lost

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his life, defendant company operated a double-track street railway on Gratiot avenue, Detroit. On and prior to that date Gratiot avenue was torn up for the purpose of repaving, and a temporary track was laid, south of the regular tracks, and within about four feet of the south curb, for the accommodation of east-bound cars. At the time of the accident, there were three tracks on Gratiot avenue where it intersects the East Grand boulevard. There were two temporary cross-overs, built across the tracks at this point, to accommodate traffic going north and south upon the boulevard. Decedent, in company with Philip West, his son, and Emil O. Basey, his son-in-law, were walking east on the south side of Gratiot. When they reached the boulevard, they desired to cross Gratiot, and attempted to do so, about 15 or 20 feet east of the west curb of the boulevard, south of Gratiot. Philip West and Basey were slightly in advance of decedent, and crossed in safety; but decedent was struck by an east-bound car. He was carried under the car and crushed, so that when taken out life was extinct. He was heard to groan for about 15 minutes after the accident. Decedent had resided in Detroit about two weeks.

Argued before BLAIR, C. J., and GRANT, MOORE, McALVAY, and BROOKE, JJ.

Brennan, Donnelly & Van De Mark, for appellant.
Trevor & Bumps, for appellee.

BROOKE, J. (after stating the facts as above). Plaintiff's principal allegation of negligence is based upon the fact that the car which struck plaintiff's decedent did not stop at the westerly side of the boulevard, in violation of his duty so to do. It was the claim of plaintiff that decedent in crossing the track relied upon the custom of the east-bound cars to stop at the westerly side of the boulevard. Exhibits were introduced by defendant, at plaintiff's request, showing that on July 16 and 29, 1907, bulletins were issued by defendant requiring all cars to stop before crossing the boulevard. Testimony was introduced on the part of the plaintiff tending to show that plaintiff's deceased knew of the custom, having observed and remarked upon it a short time previously. On behalf of the defendant, it was shown that motormen were instructed by the division superintendent to disregard this order during the period of reconstruction, and stop at the point in the boulevard where the temporary crossings had been built. This, for the reason that passengers could neither conveniently board nor alight from the cars, except at said crossings, on account of the height of the step from the ground.

Three grounds for reversal are urged by defendant:

First. That the plaintiff has selected the wrong remedy. The action is planted upon the so-called "death act" (Comp. Laws, § 10,427), and defendant contends that, as, under the undisputed testi-

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mony, plaintiff's deceased continued to live for some 15 minutes after he was struck, though he was dead when taken from beneath the car, the appropriate remedy is under the survival act (Comp. Laws, § 10,117), citing the case of *Oliver v. Houghton St. Ry. Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607. We are of opinion that this case is distinct authority for the opposite view. Where there is a continuing injury, resulting in death within a few moments, it is "instantaneous" within the meaning of the statute.

It is next urged that no negligence was shown on the part of the defendant, and that plaintiff's decedent was guilty of contributory negligence as a matter of law. We will discuss the latter question first. Emil O. Basey, the son-in-law, on cross-examination, testified as follows: "When I crossed the track, I was about 15 or 20 feet east of the west curb of the south boulevard. The temporary track was about 3½ or 4½ feet from the south curb. Q. Just before you got to the track, if you and Mr. West had stopped, that car would have gone by, if you had stopped before stepping on the track? A. Yes. Q. As a matter of fact, it would, wouldn't it? A. Yes, sir. Q. The car was right there? A. Yes. Q. You stepped on the track, and the car hit Mr. West? A. Yes. Q. So probably the car was a very short distance from Mr. West when he stepped on the track? A. It was about, I should say about, 30 feet. Q. Coming at full speed? A. Coming at fair speed—regular speed. It was the speed as they generally run on Gratiot avenue there. I could not just exactly say what speed. I was ahead of the deceased, and Philip West was ahead of him. Philip West stepped upon the track first. He crossed it. I stepped on the track and just about got off by the time that the car struck Mr. West. The motorman did not stop at the boulevard. When the deceased was struck, I was up to the next track, about as far as the next track, about 4 feet. Mr. West was a little in back of me, about a step behind, so that just as Mr. West was stepping through the track the car hit him."

Philip G. West, the son, on direct examination, testified: "We started catering across Gratiot avenue. We struck the temporary track about 15 or 20 feet east of the west curb of the boulevard south on Gratiot. Mr. Basey was between myself and father. I had not noticed a car coming until I was in between the rails of the temporary track. The car at that time was part way between the boulevard and Helen. It was nearer the boulevard than Helen, I could not say exactly how many feet. Q. Could you give us an estimate? A. Well, It might have been halfway between the boulevard and Helen. Q. You were on the temporary track at that time? A. Yes, sir. Q. Where was your father? A. Why he was about getting onto the temporary track when I was in the middle of the track. We were about 15 feet east of the

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west curb of the boulevard. When my father was struck, I was just stepping onto the main track; that is, the permanent track. Q. About where was your father when he was struck? A. He was either stepping on, or had his foot on, the track. I could not say which. He was just stepping on the second rail when the fender of the car struck him. He fell backwards. The car ran between 75 and 125 feet after it struck him."

It is apparent from this testimony that the three men, engaged in conversation, attempted to cross in front of a car moving at full speed, in broad daylight, when it was in such close proximity that the most casual observation should have warned them of the danger. If, as testified to by Basey, the car was but 30 feet away, and running at full speed, when plaintiff's decedent stepped upon the track, it was then but 10 or 15 feet west of the westerly line of the boulevard, the point at which, according to plaintiff's contention, it should have stopped, in compliance with the rule. A car running at full speed cannot be stopped in such a short distance, and a glance must have advised plaintiff's decedent that no stop was intended by the motorman. He could not rely upon compliance with a rule or custom, of the instant breach of which he had actual notice. Evidence of a regulation or custom is admissible as bearing upon decedent's negligence. *McKernan v. Detroit Citizens' Ry.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347, and cases cited. But there is no room for the application of testimony of this character where, as in the case at bar, the physical facts are such as to show beyond peradventure that plaintiff's decedent, in the exercise of the most ordinary prudence, could not have relied upon such custom or regulation.

Judgment reversed, and a new trial ordered.

LOUISVILLE & N. R. CO. *v.* ENGLEMAN'S ADM'R.

(Court of Appeals of Kentucky, Dec. 3, 1909.)

[122 S. W. Rep. 833.]

Railroads—Speed of Train Past Private Crossings—Signal—Question for Jury.*—A railroad company may run its trains at any speed it pleases over private crossings, and it is not required to give notice of their approach to such crossings, unless it has been customary for signals to be given which are relied on by persons using the crossing, and whether, in a given case, the custom of giving signals for a crossing prevailed to an extent that persons using the crossing could rely on the signals being given, is for the jury.

Railroads—Death at Crossing—Contributory Negligence—Presumptions.†—There is no presumption that a person killed at a private railroad crossing is guilty of contributory negligence; that question being for the jury.

Railroads—Death at Crossing—Signals—Reliance upon—Question for Jury.—In an action for death of a person killed at a private railroad crossing, whether the custom of giving signals for a crossing prevailed to an extent that persons using the crossing could rely on the signals being given held, under the evidence, a question for the jury.

Railroads—Death at Crossing—Instructions.—In an action for death of a person killed at a private railroad crossing, an instruction that it was the duty of defendant's employees in charge of the train, when approaching the crossing, to keep a lookout for persons traveling over the crossing, and to give reasonable signals of the movement of the train, and if defendant's employees negligently failed to perform these duties, and by reason thereof plaintiff's intestate was killed, etc., was erroneous; a proper instruction being that if it was customary for trains to give signals of their approach to the crossing, and this custom prevailed to an extent that persons using the crossing had reason to rely on such signals being given, and the train in question failed to give such signals, and by reason of such failure decedent was struck, the jury should find for plaintiff.

Trial—Instructions—Conformity to Evidence.—In an action for death of a person killed at a private railroad crossing, it was error to

*See last paragraph of second foot-note of *Cincinnati, etc., R. Co. v. Commonwealth* (Ky.), 27 R. R. R. 616, 50 Am. & Eng. R. Cas., N. S., 616; foot-note of *Crane v. Pennsylvania R. Co.* (Pa.), 26 R. R. R. 773, 49 Am. & Eng. R. Cas., N. S., 773; first foot-note of *Kunz v. Oregon R. Co.* (Ore.), 29 R. R. R. 721, 52 Am. & Eng. R. Cas., N. S., 721.

For the authorities in this series on the question whether any rate of speed of a train over a country crossing may be negligence, see foot-note of *Atchison, etc., Ry. Co. v. Schriver* (Kan.), 32 R. R. R. 267, 56 Am. & Eng. R. Cas., N. S., 267.

†See first foot-note of *Wright v. Boston & M. R. R.* (N. H.), 26 R. R. R. 110, 49 Am. & Eng. R. Cas., N. S., 110.

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charge that, although the jury believed that the employees on the train gave reasonable signals of the approach of the train, yet, if the employees discovered deceased's peril in time to have avoided the collision by the use of the available means and appliances at hand, to find for plaintiff; there being no evidence to support it.

Railroads—Crossing Accident—Duty of Engineer in Approaching Crossing.†—The engineer of a train approaching a private road crossing in the country is not bound to look away from the track to see if he can discover the top of any vehicle above the sides of the cut through which the road runs, but, on the contrary, is bound to watch the track before him.

Nunn, C. J., dissenting in part.

Appeal from Circuit Court, Lincoln County.

"To be officially reported."

Action by Bessie Kay Engleman's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Benjamin D. Warfield and J. W. Alcorn, for appellant.

Robert Harding, E. V. Puryear, M. C. Stufley, and Grcene, Van Winkle & Schoolfield, for appellee.

Hobson, J. Bessie Kay Engleman, while driving a phaëton across the Louisville & Nashville railroad track at a private crossing known as "Woods' crossing," about 2½ miles north of Stanford, Ky., was struck by the north-bound passenger train and killed. This action was brought by her administrator to recover for her death, and, a recovery having been had in the sum of \$10,000, the railroad company appeals.

The pike ran on the opposite side of the railroad from the home of the decedent. To get out to the pike from her home, she used a private road, and was struck where this road crossed the railroad. The road was used as an outlet by persons living on the farms of Samuel Harris and Eph Woods, including their tenants and persons going to or from their places on business or pleasure. There was a gate at the edge of the railroad right of way, 62 feet from the track. The private road passed through a cut just before it reached the railroad, so that a person driving a vehicle could not see an approaching train until he was within a few feet of the track, and those in charge of the train would be equally unable to see him until about the same time, unless the top of the vehicle was high enough to be visible above the cut as it approached the track. The evidence for the plaintiff tended to show that the crossing was especially dangerous, that the railroad trains

†See last foot-note of *Louisville & A. Ry. Co. v. Ratcliffe* (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255; *Louisville & N. R. Co. v. Gilmore's Adm'r* (Ky.), 33 R. R. R. 254, 56 Am. & Eng. R. Cas., N. S., 254.

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were accustomed to give signals of their approach to the crossing, and that no warning of the approach of this train was given. There was also much evidence tending to show that the trains sometimes gave signals of their approach, and sometimes did not, although the engineer of this train testified that he regarded it a dangerous crossing, and always gave the usual crossing signals as he approached it. The evidence for the defendant tended to show that the decedent drove on the crossing without looking or listening when the train was very close to it, and when it was too late for those in charge of the train to avert the injury to her. It also showed that the train gave the usual crossing signals as it approached.

On this evidence, the court, refusing to instruct the jury peremptorily to find for the defendant, gave the jury the following instructions:

"No. 1. If you believe from the evidence that the railroad crossing over the private passway, known and spoken of in the testimony as the 'Woods' crossing,' is a dangerous crossing for persons traveling thereover in buggies in an ordinarily prudent manner, then it was the duty of the employees of defendant in control of the train that struck the deceased, when moving the train on that part of the track approaching said crossing, to keep a lookout for persons traveling over same in a vehicle or vehicles, and to give reasonable signals and warnings of the movement of its train when approaching said crossing, and if you believe from the evidence that the defendant's employees in charge of said train negligently failed to perform any of these duties in the movement of said train, and that by reason thereof the plaintiff's intestate while crossing, or attempting to cross, said crossing, was run against and killed by said train, and that the deceased was at the time using ordinary care for her own safety, then you will find for the plaintiff in damages such a sum as you believe from the evidence will reasonably compensate the estate of the deceased for the destruction of her power to earn money, not exceeding the sum of \$30,000.

"No. 2. Although you may believe from the evidence that the employees on the train gave reasonable signals of the approach of the train to the Woods crossing, yet if you further believe from the evidence that the employees in charge of the movements of the train discovered the peril of the deceased in time to have avoided the collision by the use of the available means and appliances at hand, then you should find for the plaintiff."

"No. 5. Unless the defendant's employees in charge of the train were negligent as defined in instruction No. 1 then you will find for the defendant; and although you may believe from the evidence that there was such negligence on the part of said employees, yet, if, in going on the track as she did, the deceased failed to use ordinary care for her own safety, and but for this would not

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have been injured, then you will find for the defendant, notwithstanding such negligence on its part."

It has been held by this court in a number of cases that the railroad company may run its trains at such speed as it pleases over private crossings, and that it is not required to give notice of the approach of the trains to such crossings, unless it has been customary for these signals to be given, and they were relied on by persons using the crossing. *Johnson v. L. & N. R. R. Co.*, 91 Ky. 651, 25 S. W. 754; *Louisville, etc., R. R. Co. v. Survant*, 96 Ky. 197, 27 S. W. 999, 16 Ky. Law Rep. 545; *Davis v. C. & O. Ry. Co.*, 116 Ky. 144, 75 S. W. 275; *Hoback v. Louisville, etc., R. R. Co.*, 99 S. W. 241. On the other hand, it has been held that where it has been customary for signals to be given of the approach of trains to a private crossing, and these were relied on by persons using the crossing, and a traveler on the crossing was struck by reason of a failure to give the customary signals, a recovery may be had. *L. & N. R. R. Co. v. Bodine*, 109 Ky. 509, 59 S. W. 740, 23 Ky. Law Rep. 147, 56 L. R. A. 506; *Early's Adm'r v. Louisville, etc., R. R. Co.*, 115 Ky. 13, 72 S. W. 348, 24 Ky. Law Rep. 1807. There was some evidence here that the trains were accustomed to give the usual signals of their approach to this crossing, and that persons using the crossing relied thereon. This evidence was sufficient to submit the case to the jury under the rule referred to. No one saw the decedent as she approached the crossing. No one knows whether she stopped, looked, or listened, or what precautions she took. This being true, under a long line of decisions of this court, it is not presumed that she was guilty of contributory negligence, and the question is for the jury. The court therefore did not err in refusing to instruct the jury peremptorily to find for the defendant.

The rule that where it has been customary to give signals at a private crossing, and persons using the crossing have come to rely upon them, the signals may not be omitted without notice, obtains in other jurisdictions. *Westaway v. Chicago, etc., R. R. Co.*, 56 Minn. 28, 57 N. W. 222; *Nash v. N. Y. Cent. R. R. Co.*, 117 N. Y. 628, 22 N. E. 1128; 33 Cyc. 946, and cases cited. But there was in this case evidence that the train failed to whistle or give any signals for the crossing as often as they gave such signals. In view of this evidence, it was a question for the jury whether the custom of giving signals for this crossing prevailed to such an extent that persons using the crossing had a right to rely on the signals being given. It is not material that some trains passed this crossing without giving the usual signals, for some trains fail to give signals at public crossings. The case turns on whether there was such a custom to give the signals that persons using the crossing had the right to rely on it. In lieu of instruction No. 1, the court should have told the jury, in substance, that if it had been customary for trains to give signals of their approach to the

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Woods crossing, and this custom had prevailed to such an extent that persons using the crossing had reasons to rely on such signals being given, and the train in question failed to give reasonable signals of its approach to the crossing, and by reason of such failure the decedent was struck and hurt, they should find for the plaintiff as set out in the instruction; otherwise for the defendant.

There was no evidence in the case to warrant the giving of instruction No. 2. It was not incumbent upon the engineer to look across the cut to see the tops of vehicles. It was his duty to watch the track. *L. & N. R. R. Co. v. Onan*, 110 S. W. 381, 33 Ky. Law Rep. 462. An instruction of this sort should never be given, unless there is evidence to warrant it. *L. & N. R. R. Co. v. Joshlin*, 110 S. W. 383, 33 Ky. Law Rep. 513.

In *Southern R. R. Co. v. Winchester*, 127 Ky. 154, 105 S. W. 167, where we had before us an instruction similar to No. 5, we said: "In lieu of the third instruction on another trial, the court will tell the jury that it was the duty of the intestate, on approaching the crossing, to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way; that, if the crossing was especially dangerous, it was incumbent on him to exercise increased care commensurate with the danger; and that if he failed to exercise such care, and but for this would not have been injured, then the law is for the defendant, and the jury should so find, even though they may believe from the evidence that the defendant or its employees were negligent as set out in No. 1 and No. 2." Instruction No. 6 given by the court, practically conformed to the rule thus laid down, but, for brevity, on another trial the court will give the one instruction indicated.

The two instructions we have outlined, with instructions Nos. 4 and 8, given by the court, defining "reasonable signals" and "ordinary care," cover the whole law of the case. The other matters complained of will not, perhaps, occur on another trial.

Judgment reversed, and cause remanded for a new trial.

NUNN, C. J. I agree to the reversal, but do not assent to the opinion wherein it relieves the appellant from giving warning of the approach of the train to a known unusually dangerous private crossing. As decided by this court in the case of *L. & N. R. R. Co. v. Bodine*, 109 Ky. 509, 59 S. W. 740, 23 Ky. Law Rep. 147, 56 L. R. A. 506, the effect of the opinion is to give notice to railroad companies to cease to give warnings of the approach of their trains in such cases.

HUNTINGTON v. BANGOR & A. R. Co.

(Supreme Judicial Court of Maine, May 14, 1909.)

[74 Atl. Rep. 803.]

Railroads—Crossing Accident—Care Required—Warning.*—A railroad company is bound to take reasonable and proper precautions for the safety of travelers upon the highway, having reference to all the circumstances and probabilities to be anticipated, and when a railroad crossing is especially dangerous, the railroad company must employ such means as are reasonably necessary, considering its character, to warn travelers of the approach of a train.

Railroads—Crossing Accident—Warning.—It is difficult, if not impossible, to lay down an abstract rule of law as to the exact time when, or the exact distance at which, travelers should be warned of an approaching train. It must be governed largely by the circumstances and surroundings of each particular case. In a general way it may be said that it is a flagman's duty to give such seasonable warning as will enable a traveler to stop his team at a point where an ordinarily well-broken and gentle horse would not become dangerously frightened. Circumstances and conditions might modify this, and impose a greater obligation upon him, but this would seem to be a workable principle.

Railroads—Crossing Accident—Flagman—Negligence.—A flagman, whose duty it is to guard a railroad crossing over a public street, and who remains at his post of duty until an approaching train has reached the crossing and is passing the same, is not negligent in then leaving his post, as the train itself then becomes a warning.

Railroads—Crossings—Safety Appliance—Gates.*—When gates at a railroad crossing would not cause a traveler approaching such crossing to stop any sooner than a flagman, it is not negligence on the part of the railroad company to maintain a flagman at such crossing, instead of gates attended by a watchman.

Railroads—Crossings—Safety Appliance—Purpose—Gates.—The purpose of gates at a railroad crossing over a public street is merely to give warning that trains are passing, or about to pass; and it cannot be successfully contended that, under ordinary circumstances, gates should be maintained as a barrier to runaway teams.

Railroads—Crossing Accident—Negligence.—The plaintiff, a girl of 19, and who was an expert horsewoman, was driving along a public street towards the point where the defendant's railroad crossed the street. She was entirely familiar with the crossing and its approaches. The horse driven by her was 17 or 18 years old, and was regarded as perfectly kind and safe and not afraid of moving trains. When the plaintiff was approaching the crossing, she saw the defendant's flag-

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to crossing flagmen and gates, see second foot-note of *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48.

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man standing near the crossing, and towards the westerly side of the street, but he was not waving his flag. Upon seeing the flagman, however, the plaintiff immediately stopped at a point 91 feet from the crossing. She had not then heard any bell or whistle or seen any approaching train. She remained stationary, the horse entirely docile and unfrightened, for what she said seemed to her a long time, when the engine and the forward cars of a long freight train came into view at the crossing, moving at the rate of about four miles an hour, on an upgrade, with all the noise usually attendant under such conditions. While the train was passing the crossing, the horse suddenly started, and dashed against the train with such force as to throw the plaintiff from the wagon and beneath the train, and resulting in the loss of her left hand at the wrist.

Held, that the defendant was neither responsible nor liable for the plaintiff's injuries, but that the case belongs to a class of lamentable accidents for which no one is legally liable.

(Official.)

On motion from Supreme Judicial Court, Piscataquis County.

Action by Blanche G. Huntington, by her next friend, against the Bangor & Aroostook Railroad Company, to recover damages sustained by plaintiff in a crossing accident by defendant's alleged negligence. Plaintiff recovered a verdict of \$6,125, whereupon defendant moved in the Supreme Judicial Court to set the verdict aside. Motion sustained.

Argued before EMERY, C. J., and WHITEHOUSE, SPEAR, CORNISH, KING, and BIRD, JJ.

Hudson & Hudson, for plaintiff.

Louis C. Stearns, F. H. Appleton, and Hugh R. Chaplin, for defendant.

CORNISH, J. This is an action on the case to recover damages for personal injuries received in a crossing accident, November 4, 1907, and comes to this court on defendant's motion to set aside a verdict for the plaintiff.

The crossing in question is over South Main street in the thickly settled portion of the village of Guilford. Ninety-one feet south of the crossing, an iron bridge, 174 feet long and 19 feet wide in the clear, spans the Piscataquis river. South of this bridge South Main street ascends a steep hill known as Bridge hill, at whose top is a public square. To a traveler going north, as was the plaintiff, the view of the railroad crossing from the square, a distance of between 400 and 500 feet, is clear and unobstructed, and remains so until the crossing is reached. The railroad track or a railroad train east of the crossing is discernible to such traveler only at intervals, owing to intervening buildings on the north side of the river.

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For 25 years the railroad company has employed as a flagman one Cimpher, a harness maker, with a shop on the westerly side of the street, near to and south of the crossing. About 3 o'clock in the afternoon of the day of the accident the plaintiff, a girl of 19, started with a team from her home about 1½ miles south of Guilford village, to go over the route above described to the schoolhouse situated north of the crossing in question, to bring her brothers from school, as was her custom. She was entirely familiar with the crossing and its approaches. The horse was 17 or 18 years old, had been her favorite family horse for a year, and was regarded as perfectly kind and safe. She herself was an experienced horsewoman, having driven since she was 8 or 9 years old. On arriving at the village square she walked her horse down Bridge hill, and while descending the hill says that she looked across the river, but did not see the flagman at the crossing. As she was entering on the bridge she looked down and across the river, but saw no train, although at various points one must have been plainly visible. She continued slowly across the bridge, either at a slow trot or a walk, and when she reached the north end she saw the flagman for the first time, as he was standing near the crossing and toward the westerly side of the street. He was not waving his flag, but the plaintiff readily interpreted the meaning of his presence, and immediately stopped, "because," as she testified, "I saw him with his flag." She had not then heard and bell or whistle or seen any approaching train. She remained stationary, the horse entirely docile and unfrightened, for what she says seemed to her a long time, when the engine and the forward cars of an exceptionally long freight train came into view at the crossing, moving from the east at the admitted rate of about four miles an hour, on an upgrade, with the noise usually attendant upon those conditions. The horse acted "all right" when the engine came into view, and while the engine and the first two or three cars were passing the crossing. Then the horse "started all of a sudden, kind of jumped like," as the plaintiff expresses it, or, as an eyewitness says, "All at once the horse shook his head, and made a rise right up on his hind feet and run toward the train." He dashed against it with such force as to throw the plaintiff from the wagon and beneath the train, from which she was rescued with the loss of her left hand at the wrist.

With this picture of the accident in mind, a picture drawn by the plaintiff herself, can the verdict be sustained? However much we may sympathize with the plaintiff because of her lamentable injury, we are unable to find the grounds upon which liability for its occurrence can be fastened upon the defendant. We will assume that there was sufficient evidence to warrant the jury in finding that the plaintiff was in the exercise of due care. The

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important question remains whether there was evidence that the accident was caused by the negligence of the defendant.

So far as the management of the train itself is concerned no negligence is charged. It is not controverted that in approaching the crossing the proper warnings were given, the whistle sounded, and the bell was rung, while the speed was only four miles an hour.

But the learned counsel for the plaintiff contends that the defendant did not exercise due care in three respects, any one of which would support the verdict. First, because the flagman did not warn the plaintiff seasonably to enable her to stop at a safe distance and avoid the risk of collision and of alarm to her horse. It is difficult, if not impossible, to lay down an abstract rule of law as to the exact time when, or the exact distance at which, travelers should be warned of an approaching train. It must be governed largely by the circumstances and surroundings of each particular case. In a general way it may be said that it is a flagman's duty to give such seasonable warning as will enable a traveler to stop his team at a point where an ordinarily well-broken and gentle horse would not become dangerously frightened. Circumstances and conditions might modify this and impose a greater obligation upon him, but this would seem to be a workable principle. Measured by this rule, no want of due care can be attributed to the flagman in this case. The evidence shows that this freight train had been engaged in work at the station and on the sidings a considerable distance east of the crossing, and that it whistled out of the station as it finally started. This signal brought the flagman from his shop, the door of which was open, to his post of duty in the street, where he stood for nearly two minutes before the engine reached the crossing. While standing there, he says he saw the plaintiff as she drove onto the southerly end of the bridge, a distance of 265 feet. He was in plain sight of the plaintiff as she walked her horse across the bridge, although her mind did not perceive him until she reached the northerly end. He could not be expected to move towards the bridge, because his duty was to warn teams coming from the north, as well as the south, and his post was at or near the crossing.

The conclusive fact, however, is that his warning was effective. It stopped the team at a point and at a time when the horse was in no way disturbed by the train, even when the engine and the first two or three of the cars had passed the crossing. It is not a case where neglect of duty incumbent on the defendant or its servants caused the plaintiff to approach so near the passing train that her horse took fright and caused the injury. It was not because of any want of due care on the flagman's part that she omitted to take precautions in regard to her horse which would have avoided the injury, nor because of any neglect of his did she place herself in such a position in reference to the passing train as she

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would not otherwise have done, and thereby lost control of the horse. It is clear from the plaintiff's own testimony that she stopped the horse at what she deemed a safe place. Had she seen the flagman earlier, she doubtless would not have stopped before she did. Why should she have done so? She had full confidence in herself as a driver. She had full confidence in the gentleness of the horse and felt no fear whatever. She had frequently driven him near moving trains under worse conditions, and he had shown no fright. She even declined the offer of the witness Perkins, who stood near by, to hold her horse after she had stopped at the end of the bridge, and in reply to his question whether the horse was scared, she said: "No; the horse was kind and was not scared of the train"—and Perkins added, "I told her if her horse was scared I would hold it."

Plainly no omission of the flagman in failing to give reasonable warning was the proximate cause of the accident.

In the second place the plaintiff finds negligence in the defendant in maintaining a flagman, instead of gates attended by a watchman. It is true that a railroad company is bound to take reasonable and proper precautions for the safety of travelers upon the highway, having reference to all the circumstances and probabilities to be anticipated, and, when a railroad crossing is especially dangerous, the company must employ such means as are reasonably necessary, considering its character, to warn travelers of the approach of a train. But we fail to see how gates at this crossing could have been more effective than the flagman, how they could have prevented this accident, or how their nonexistence can be construed as the proximate cause of the accident. The purpose of gates is merely to give warning that trains are passing, or are about to pass. And gates would not have caused the plaintiff to stop any sooner than did the flagman. Whatever the form of warning, her confidence in the horse governed the stopping place. Nor can it be successfully contended that under ordinary circumstances gates should be maintained as a barrier to runaway teams. Such is not their ordinary purpose. *Marks v. Fitchburg R. R. Co.*, 155 Mass. 493, 29 N. E. 1148; *Brooks v. Boston & Maine R. R.*, 188 Mass. 416, 74 N. E. 670.

In the latter case the plaintiff claimed that a gateman, in addition to the gates, should have been maintained. The court disposed of this contention in these words: "We are of opinion that this contention is not well founded. The gates were operated effectually, and proper warning was given in this way. If there had been a gateman on the ground, it is difficult to see what he could have done to avert this accident. Gatemen are not employed to place themselves in front of runaway horses for the purpose of stopping them. An attempt of this sort is more likely to be harmful than otherwise." The same doctrine *mutatis mutandis* applies here. The third contention made by the plaintiff

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needs but brief consideration; this is, that the flagman left his post of duty before the train passed over the crossing. The weight of the evidence is against the proposition as a fact. The flagman may have walked toward the side of the street, but he remained in some part of the street until the train reached the crossing, and at that moment the train itself became a warning. "When a traveler sees the train itself in front of him, he has all the warning that gates can give." *Theobald v. Railway Co.*, 75 Ill. App. 208. Moreover, when the engine had passed the crossing, the horse was standing quietly, so that the position of the flagman is entirely immaterial. He had already fulfilled his duty.

In conclusion it is the opinion of the court that this case belongs to a class of lamentable accidents for which no one is legally liable. *Berry v. B. & M. R. R. Co.*, 102 Me. 213, 66 Atl. 386. The sudden and unaccountable frenzy that seized this old and gentle horse and caused him to plunge into a moving train was an act for which neither the plaintiff nor the defendant was responsible. Without the slightest warning he did what he had never done before, and what the plaintiff had no reason to think he was disposed to do. It seemed unlike the ordinary fright, because he dashed directly towards and into what might otherwise be considered the cause of his fright.

The sympathy of the jury must have blinded them to the legal principles involved, for the verdict is clearly wrong.

Motion sustained.

Verdict set aside.

ST. LOUIS & S. F. R. CO. *v.* SUMMERS *et al.*

(Circuit Court of Appeals, Eighth Circuit, October 11, 1909.)

[173 Fed. Rep. 358.]

Railroads—Injury to Persons at Crossings—Grounds of Liability.*

—The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing railroad tracks as will preclude recovery for any primary negligence of the railroad company in operating its trains so as to cause his injury, he may still recover if, after actually discovering that he was in imminent peril, the railroad company by the exercise of ordinary care could have prevented his injury and failed to do so; but in such case some new act of negligence must arise to create the cause of action, and must be established by proof, unaided by the former acts, which have been excused by the traveler's contributory negligence.

Railroads—Accidents at Crossings—Negligence.†—The fact alone that those in charge of a railroad train observe a person driving with a team toward a crossing ahead of the train is not sufficient to apprise them that he is in danger, or to charge them with negligence for not stopping the train; but they have the right to presume that the traveler will stop before reaching the crossing, as the law requires.

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by Alfred Summers, special administrator of the estate of Hattie Magar, deceased, and others, against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

A passenger train, operated by the defendant company and running eastwardly at a rate of speed variously estimated at 10, 15, 25, and 30 miles an hour through the town of Ada, in the Indian Territory, came into collision at a street crossing with a team driven by David Magar, and he was killed. His widow and minor children instituted this suit to recover damages. They charged in their complaint that the railroad company was negligent in operating its train at an excessive rate of speed, in violating a speed ordinance of the town, in failing to keep a proper lookout, in failing to stop the train before it reached the crossing, and that as a result of these acts of negligence Magar lost his life and they were damaged. The defendant denied the acts of negligence, and pleaded contributory negligence as its defense. In the course

*See third foot-note of *Louisiana & A. Ry. Co. v. Ratcliffe* (Ark.), 33 R. R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255; third foot-note of *Stearns v. Boston & M. R. R.* (N. H.), 32 R. R. R. 55, 55 Am. & Eng. R. Cas., N. S., 55.

†See first foot-note of *Boulden v. Louisville & N. R. Co.* (Ky.), 32 R. R. R. 99, 55 Am. & Eng. R. Cas., N. S., 99.

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of the trial it became manifest that the plea of contributory negligence had been sustained, and the trial court so instructed the jury, but submitted the cause on the sole issue whether, notwithstanding the contributory negligence of Magar, the railroad company might, after discovering his peril, by the exercise of ordinary care, have avoided a collision and prevented the death. Defendant at the close of the plaintiffs' evidence moved for an instructed verdict in its favor, on the ground that there was no substantial evidence to support a verdict for plaintiffs on this issue. This motion was denied. Defendant reserved proper exceptions to the ruling and declined to offer any testimony in its behalf. A verdict and judgment in favor of plaintiffs followed, and defendant now prosecutes error.

E. T. Miller (*W. F. Evans*, on the brief), for plaintiff in error.

Clinton A. Galbraith, *Tom D. McKeown*, and *A. C. Cruce*, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). The facts, we think, show that the trial court was right in holding that the decedent was guilty of such contributory negligence as precluded plaintiffs' recovery by reason of any of the primary acts of negligence complained of, even if they were established, and no complaint is made of that ruling by plaintiff.

This leaves for our consideration the sole question whether there was any evidence to support the finding necessarily made by the jury that defendant railroad company could, by the exercise of ordinary care, after discovering that the decedent was in a situation of peril and danger, have avoided injuring him. The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing a railroad track as precludes recovery for the primary negligence of the railroad company in operating its train so as to bring about a collision with him, yet another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could, by the exercise of ordinary care, have stopped its train, or otherwise have avoided injuring him, and failed to do so. *Chunn v. City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459. But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence of the traveler in law fully exonerates the railroad company from the consequences of its original negligence, and some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by

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proof, unaided by the former acts, which have been excused by the traveler's contributory negligence.

Let us therefore inquire whether the servants of the railroad company had actual knowledge of the peril of the decedent, and whether with that knowledge they exercised reasonable care to avoid injuring him. The decedent, at the time he was killed, was engaged in hauling freight at or near the depot in Ada. He was driving a two-horse team southwardly along Townsend avenue, had just driven across one track, called the "mill track," 157 feet north of the main track, and another track, called the "house track," 50 feet north of the main track; and, as his horses reached the main track, an east-bound passenger train struck them, and he was thrown from his wagon, receiving injuries from which he died. There were five witnesses to the accident. Four of them stated that the decedent drove his freight wagon slowly across the mill track and house track, and towards the main track, looking generally in a southern or southeastern direction towards a switch engine, which was standing still on a switch track running south and parallel with the main track: One witness stated that Magar was trying to hold his horse down which, he says, were "kind of frightened" at the engine over on the switch track; but, when pressed to tell what Magar did, said:

"I disremember exactly, only he kind of made a haul like this (indicating) on his lines."

This evidence, and such evidence as this, is too vague and uncertain, especially when taken with that of the four other witnesses to the accident, which give no such account, to establish any state of peril on the part of Magar which would be reasonably observable by the engineer in charge of the train.

But it is argued that the engineer sounded three or four short whistles when between 300 and 350 feet of the crossing, and that a man on the side of the engine usually occupied by the fireman was seen, at some undisclosed distance from the crossing, to wave his hand out of the window. These facts, together with the fact that the engineer could have seen the crossing, and have seen Magar approaching, a sufficient time to enable him to stop his train before reaching the crossing, are relied on as proof of actual knowledge and appreciation of Magar's danger by the engineer; but they are clearly insufficient for that purpose. There is no showing why the short whistles were sounded, and certainly none that they were sounded because of Magar's danger. Common experience suggests that they were most likely the usual and customary signals given by engineers in charge of railroad trains at the approach of crossings. The waving of the hand from the fireman's window might have been for many purposes other than a recognition of Magar's danger. It may be that the engineer might have seen, and should be presumed to have seen, Magar approaching the main track; but this would constitute no evi-

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dence that his peril was appreciated. Common observation and experience teach that men engaged in hauling freight about railroad stations frequently approach close to the tracks with their teams and stand there while trains pass near them. Engineers in charge of trains must be presumed to be familiar with this practice, and to operate their trains in the light of it. It would constitute a serious embarrassment to traffic, if engineers should be required to stop or slow up upon seeing the approach of a wagon to the tracks. They have a right to presume that the drivers will observe the precaution which the law imposes upon them as a duty, and keep off the tracks on the approach of trains.

In the recent case of *Illinois Cent. R. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13, we had before us a case similar to this. We there held that the men in charge of a train were not obliged to anticipate the negligence of a traveler. We said:

"They could very well have assumed either that he [the traveler] knew of the approach of the cars and intended to stop at the customary safe distance, or that he would look when near the track and then stop before going upon it."

That case controls this.

The judgment must be reversed, and the cause remanded for a new trial in harmony with the views herein expressed. It is so ordered.

CLEVELAND, C., C. & ST. L. RY. CO. v. RUDY et al.

(Supreme Court of Indiana, Nov. 23, 1909.)

[89 N. E. Rep. 951.]

Carriers—Action for Freight—Evidence—General Denial.—In an action against three persons for freight for transporting horses under a contract made with one of them, the fact that the other two neither shipped nor owned the horses transported, and were not bound to the carrier by contract, express or implied, for the freight, may be proved under the general denial.

Pleading—Office—Answer—Counterclaim.—A pleading of a party cannot be made to perform the double office of an answer and counterclaim, and this rule is always applied to pleadings filed by the same party or parties, but not to pleadings filed by different parties as a several plea for each.

Pleading—Character—Questions for Court.—The court will determine the character of a pleading, whether it is an answer or a counterclaim, by the facts which it contains and the character of relief sought, and not by what the pleader calls it.

Appeal and Error—Harmless Error.—In an action against C., M., and P. for freight for transporting horses under a contract made with

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C., a pleading by defendants, reciting, "The defendants each for himself," for an answer and by way of counterclaim, alleges, etc., an answer showing that M. and P. are not liable for the freight, and a prayer for damages in favor of C., and by the words "and defendants each pray judgment for costs," etc., is, in substance a counterclaim of C., and an argumentative answer in denial of M. and P., and, though offensive the overruling of a demurrer to it does not justify a reversal of the judgment for C. on the counterclaim.

Carriers—Action for Freight—Action for Damages to Shipment.—The right of a carrier to sue for the freight for transporting a shipment and the right of the shipper to sue for damages to the shipment are independent, and it is no defense to an action for damages that the freight has not been paid.

Carriers—Contract of Carriage—Validity.*—The condition, in a contract for the carriage of live stock, that a verified claim for damages shall be filed with the carrier's agent within five days from the date of the removal of the stock from the cars, is a valid condition precedent to the shipper's right to sue for damages, and a compliance with the condition or its waiver must be shown in the pleading.

Carriers—Carriage of Live Stock—Claim for Damages—Waiver.*—Where a shipper of horses, under a contract stipulating for the filing of a verified claim for damages within five days from the removal of the horses from the cars at destination, filed his claim for damages with the carrier's agent at the point of destination on the day of the removal of the horses, and the claim was within 24 hours transmitted to the carrier's claim agent, who notified the shipper that the claim would not be considered unless the freight charges were paid, and he made no other objections, the carrier waived the right to insist on the filing of a verified claim.

Trial—Verdict—Construction.—Where, in an action against three persons, there was but one counterclaim and one counterclaimant, a verdict in favor of "counterclaimants" was a verdict for the counterclaimant, and a judgment in his favor was proper, and a disclaimer of the other two persons should on their motion be granted.

Appeal and Error—Instructions—Review.—The giving of an instruction, which is within itself radically wrong and erroneous under any conceivable state of the evidence, will be condemned, though the evidence is not in the record.

Carriers—Carriage of Live Stock—Liability.†—A carrier of live stock is not liable for injuries inflicted by the animals on each other in the exercise of their natural habits and propensities.

*See foot-note of *Merchants' and Miners' Transp. Co. v. Eichbery* (Md.), 32 R. R. R. 259, 55 Am. & Eng. R. Cas., N. S., 259; last foot-note of *St. Louis, etc., R. Co. v. Copeland* (Okl.), 32 R. R. R. 236, 55 Am. & Eng. R. Cas., N. S., 236.

†See first foot-note of *Swiney v. American Express Co.* (Iowa), 29 R. R. R. 1, 52 Am. & Eng. R. Cas., N. S., 1; first foot-note of *Cincinnati, etc., Ry. Co. v. Greening* (Ky.), 26 R. R. R. 235, 49 Am. & Eng. R. Cas., N. S., 235.

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Trial—Instructions.—An instruction, in an action for damages to a shipment of horses, that a carrier undertaking to carry freight for hire is an insurer under the common law, and, in the absence of any valid contract limiting the common-law liability, it is exempt from liability only for damages occurring through the act of God or the public enemy, is erroneous because ignoring the fact that a carrier of live stock is not liable for injuries inflicted by the animals on each other.

Trial—Instructions.—Where, in an action for damages to a shipment of horses, it appeared that the shipper for a reduced tariff and free transportation for an attendant agreed to feed, water, and care for the stock and assumed the risk of damage which the animals might inflict on themselves, an instruction that a carrier undertaking to carry freight for hire is an insurer and liable for damages, except those occurring through the act of God or the public enemy, was improper, because ignoring an element of damage sued for resulting from the fact that the animals inflicted injuries on each other.

Carriers—Action for Freight—Action for Damages to Shipment—Instructions.—Where, in an action for the freight for transporting horses, defendant filed a counterclaim for damages to the horses, an instruction that the measure of damages was the difference in the value of the horses at the point of destination, less any necessary depreciation in value that would ordinarily result from transportation and their value at the point of destination at the time they were delivered, and an instruction that, if the jury found some amount due the carrier on its claim for freight and some amount due for damages, it should deduct the smaller from the larger and return a verdict for the excess in favor of the party entitled to it, sufficiently submitted the measure of recovery.

Appeal from Circuit Court, Delaware County; J. G. Leffler, Judge.

Action by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company against Clayton H. Rudy and others. There was a judgment of the Appellate Court (87 N. E. 555) affirming by a divided court a judgment for defendants, and the cause was transferred to the Supreme Court under Burns' Ann. St. 1908, § 1394. Reversed and remanded.

Thompson & Sprague, for appellant.

Bingham & Long, for appellees.

HADLEY, C. J. Appellee Clayton H. Rudy, by special contract in writing, contracted with the Oregon Short Line Railway for the transportation of a car load of horses from Lima, Mont., to Peoria, Ill., and with the appellant, by a like contract, for the transportation of the same horses from Peoria to Yorktown, Ind., and this suit was brought by appellant, on the contract made with it, against all of the appellees to recover the freight charges.

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There was a general denial to the complaint by each of the defendants. They each also filed two paragraphs of what are denominated "answer" and "counterclaim," which were challenged by demurrer. The demurrer being overruled, both an answer to the pleading as a counterclaim and a reply to it as an answer were filed, the cause submitted to a jury for trial, and a general verdict returned in favor of "all the counterclaimants," and assessed their damages at \$650. Appellant filed a motion for a new trial, and pending this motion the appellees, Montezuma and Parker F. Rudy, filed what is called a "disclaimer," in which they disclaim any interest in the subject-matter of the controversy, and consented to the rendition of judgment upon the verdict in favor of appellee Clayton H. Rudy. Appellant moved to strike out and reject this disclaimer, which motion was overruled. Appellant's motion for a new trial was then also overruled, and judgment was rendered on the verdict, without further objection or exception from appellant, in favor of the appellee Clayton H. Rudy.

A great many questions are presented by the record and discussed by appellant in its brief, and, among others, the sufficiency of the second and third paragraphs of the answer and counterclaim. These pleadings in form, are truly exceptional. The introductory part of each paragraph (and they are substantially alike in all their allegations) is as follows: "The defendants each for himself for a (second or third) paragraph of answer to plaintiff's amended complaint, and by way of counterclaim, alleges." Then follows a statement of the facts constituting the grounds of counterclaim and answer, and the pleading winds up with this prayer for relief: "Whereof defendant Clayton H. Rudy prays the court for damages in the sum of \$2,000, and that an amount of damages equal to any amount found due plaintiff on account of the claim sued on be recouped against the same, and that said defendant have judgment for costs and for the damages he has sustained in excess thereof, and defendants each pray judgment for costs and all other proper relief." No facts are averred in either paragraph of counterclaim showing any right of action whatever in favor of either Montezuma or Parker F. Rudy. Both paragraphs allege that Clayton H. Rudy was the sole owner and shipper of the horses, and his claim to recover damages is predicated upon the injury done the animals in transportation, through the negligence of appellant to discharge its duty as a common carrier in respect thereto; but, while the facts pleaded show no grounds of counterclaim in favor of Montezuma and Parker F. Rudy, they do state facts which do constitute a complete defense to appellant's complaint against them severally. The facts stated in these paragraphs of the pleading show that they neither shipped nor owned the horses transported by appellant, and were not in any wise bound to appellant by contract,

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express or implied, for the freight thereon. These facts could have been proved under the answer of general denial; but that circumstance would not affect the question of the correctness of the ruling of the court on the demurrer to these paragraphs of the answer, if it can be treated as a separate answer of these two parties.

The pleadings are attacked by appellant upon the ground that they are the joint counterclaims of all three of the defendants, and that, as neither paragraph states a cause of action in favor of Montezuma or Parker F. Rudy, they are bad, and, if the premise that they are joint counterclaims is correct, there was manifest error in overruling the demurrer to them. The law is so well settled in this state that a pleading filed by a party to a suit cannot be made to perform the double office of an answer and counterclaim, that we do not deem it necessary to cite the cases holding this to be the law. It is also the settled rule that the court will determine the character of a pleading, whether it is an answer or a counterclaim, not by what the pleader calls it, but by the facts which it contains and the character of relief sought. The first rule has always been applied to pleadings filed by the same party or parties, and not where it is filed by different parties as a several plea for each of them. This pleading is a judicial novelty, in that, while it purports to present but one statement of facts, these facts are pleaded by each defendant severally and ostensibly for himself, but for no other apparent purpose than to strengthen the claim of Clayton H. Rudy, and show the nonliability of Montezuma and Parker F. Rudy for costs. It is alleged, each for himself, that the horses were the property of Clayton H. Rudy, shipped by and for him, accompanied by Montezuma for Clayton H., and that all notices, demands, and agreements that arose and became necessary during the transit were made by Montezuma for and on behalf of Clayton H., that the damages to the horses, resulting from the negligence complained of, accrued to Clayton H., and the general prayer is that the defendant Clayton H. Rudy have judgment for the sum found due him as damages, and the other two have judgment for costs and all proper relief. This form of pleading should not be permitted by the trial court; but its analysis unmistakably shows that in substance and effect it is the counterclaim of Clayton H. Rudy, and the argumentative answer in denial of the other two, and, while offensive to every recognized rule of pleading, does not afford a sufficient reason for a reversal of the judgment.

The counterclaim is also attacked as the separate counterclaim of Clayton H. Rudy, in that it reveals that his rights are based upon a contract which is affirmatively shown he has failed to comply with in these respects: In that he has failed to pay the freight charges on the horses claimed to have been injured in the transportation, and in that he has failed to file his verified claim, in

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writing with the appellant's freight claim agent, at his office in Cincinnati within five days of the time the horses were delivered to him, as required by the terms of the contract set forth in the counterclaim. Appellee's right of action set up in his counterclaim for damages, done his property through the failure of appellant to perform its obligations as a common carrier, did not in any wise depend, as a condition precedent, on his payment of the freight charges. The right of appellant to sue for the freight, and the right of appellee to sue for his damages, were each independent of the other. Appellant would have no more right to insist that appellee should pay the freight before he could maintain an action for damages done his property in carriage than appellee could insist that appellant pay the damages to the property before it could maintain an action for the freight. The suits would, in each case, be brought, not for the enforcement of the contract, but for its breach.

The condition in the contract set up in the counterclaim, that a verified written claim for damages should be filed with appellant's agent within five days from the date of the removal of the stock from the cars, was a valid condition precedent to appellee's right to maintain an action for the damages, and a compliance with the condition or its waiver must be shown in the plea. It is averred, however, in the counterclaim, that, on the day on which the horses were unloaded from the car, appellee filed his claim with the appellant's agent at Yorktown for the damages sustained by him on account of the injuries to said stock in shipment, through the alleged negligence of the appellant, and that said claim was, within 24 hours, transmitted by said agent to appellant's claim agent at Cincinnati, that said agent advised appellee Clayton H. Rudy that it would not settle said claim or consider it until the freight charges were paid, and made no other objection to the claim. This was a waiver by appellant of the right to insist upon the verified claim being filed with the Cincinnati agent. The placing of its delay, or refusal to pay the claim, upon grounds other than the unperformed condition with respect to the filing and verification of the claim, was in legal effect a relinquishment of its right to claim a forfeiture for noncompliance. *Railway Co. v. Heath*, 22 Ind. App. 47, 53 N. E. 198; *Elliott on R. R.* § 1514; *Thompson's Neg.* § 6515. The counterclaim was not, on this account, bad. We think it was good as the separate counterclaim of appellee Clayton H. Rudy.

The action of the court in overruling appellant's motion to reject the alleged disclaimer of Montezuma and Parker F. Rudy is urged as a reversible error. We think the ruling was quite proper. The verdict made by the jury was "for all the counterclaimants for \$650," when there was no averment, prayer, or shadow of evidence warranting it. If the verdict should be construed as a verdict in favor of all three of the parties, then

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the appellant's motion for a new trial should have been sustained, as the verdict would clearly be contrary to law, and that was one of the reasons assigned in appellant's motion for a new trial. As before stated, there was no pleading of either Montezuma or Parker F. Rudy in the case that authorized a verdict in their favor for damages. Neither of them asked for such a verdict in any pleading filed, and a verdict in their favor for damages was contrary to law. They might, if the evidence justified it, have been entitled to a general verdict in their favor, but not for damages. As we construe these pleadings, however, there was but one counterclaim and one counterclaimant, and that was Clayton H. Rudy. The verdict in favor of "the counterclaimants" will be construed to be a verdict in his favor, and a judgment in his favor, on such verdict, properly follows the verdict.

It is insisted that error was committed in the giving of instruction No. 15 of the court's own motion, which instruction is in these words: "Railroad companies that undertake to carry freight for hire are insurers of the property they engage to transport, under the common law, and, in the absence of any valid or binding stipulations in the contract of carriage limiting such common-law liability, they are only exempt from liability for damages to property occurring through the act of God or the public enemy." With respect to this charge, by stating the proposition in a more condensed form, the jury, in effect, was instructed that, in the absence of a valid contract limiting its liability, the railroad company was an insurer of the safe delivery of the animals to the consignees and was liable for all damages that accrued to them in the transportation that was not caused by the act of God or the public enemy. The evidence is not in the record, and the giving of this charge to the jury must be held erroneous if it was improper, under any conceivable state of the evidence admissible under the issues. *Wenning v. Teeple*, 144 Ind. 189, 194, 41 N. E. 600; *Rapp v. Kester*, 125 Ind. 79, 82, 25 N. E. 141; *Murray v. Fry*, 6 Ind. 371, 373. The rule in such cases is: If an instruction, within itself, is radically wrong, and liable to direct the minds of the jury to an improper basis for its verdict, it should be condemned. Under the rule, we think this instruction is too narrow and, consequently, misleading. The rigor of the common law, in holding a common carrier of property as an insurer of the safe delivery of the goods, except as to damage from the act of God or the public enemy, has been relaxed in this and most of the American states, more especially as applied to the carriage of live stock. Broadly stated, it may now be said to be firmly established in this country that, when more than one animal is shipped in the same carriage, the carrier, in the absence of negligence, is not liable for injuries inflicted by the animals upon each other in the exercise of their natural habits and propensities. The doctrine rests upon the same principle that ex-

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exempts the carrier of fresh meats, vegetables, and other perishable property from liability for the tainting, rotting, and deteriorating of the property during the carriage, from some natural, inherent quality, and without fault on the part of the carrier. Elliot on R. R. § 1546, and cases collected in note; Hutchinson on Carriers, § 216a; Moore on Carriers, p. 496, § 1; 5 Thompson, L. of Neg. 6471; *Quinby v. Union Pac. R. Co.* (1909) 83 Neb. 777, 120 N. W. 453; *Foust v. Lee* (1909, Mo. App.) 119 S. W. 505; *Lewis v. Penna Co.* (1907) 70 N. J. Law, 132, 56 Atl. 128; *Evans v. Railroad Co.*, 111 Mass. 142, 15 Am. Rep. 19.

Charge 15 overlooks this principle. It is not proper to say that a carrier can, by special contract, limit or free himself from a liability that does not and cannot under the law exist. Neither can a special contract, limiting legal liability, in any sense create a liability where none exists without such contract. If, then, in the transportation of animals, there is no liability in the faultless carrier for self-inflicted damages, instruction 15, which is equivalent to a charge that he is liable for all damages accruing in the shipment not caused by the act of God or the public enemy, authorizes a recovery for an injury in the shipment for which the carrier is not liable, and it is clearly erroneous under any possible state of legitimate evidence. Appellee's counterclaim shows that, for a reduced tariff and a free transportation for an attendant, he agreed, in the shipping contract, to feed, water, and care for the animals in transit at his own risk and expense, and assumed all risk of damage which the animals might inflict upon themselves. The counterclaim also shows that one element of damage sued for was that which resulted from the horses chewing off each other's manes and tails—a damage imposed, doubtless, by the natural propensity of the animals, and one that probably might have been prevented by a watchful care taker. So it is plain that the effect of charge 15 might have had an important influence upon the verdict, and also have enabled appellee to recover for his own breach of contract.

The giving of instruction No. 17 is also complained of. It reads as follows: "The measure of the damage of the owner and shipper of the horses in controversy, if you shall find that the horses were damaged by the alleged negligence of the plaintiff, is the difference in the value of the said horses at Yorktown, Ind., less any necessary depreciation in value that would ordinarily result from their transportation by freight trains under the conditions then existing at the time they were received by plaintiff for shipment, from Peoria, Ill., to said Yorktown, and their value at said Yorktown at the time they were delivered." In relation to this charge, it will be observed that it does not purport to go further than state the measure of the counterclaimant's damage, if any, and in this we think it is substantially correct. The nineteenth charge given by the court in

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effect directed the jury that if it found some amount due the plaintiff (railroad company) on its claim for freight, and some amount due the counterclaimant as damages to his horses, it should deduct the smaller amount from the larger and return a verdict for the excess in favor of the party appearing to be entitled to it. Standing alone as a general instruction on the measure of damages, No. 17 would be incomplete for omitting to direct a charge of the freight against the shipper. *Wallace v. Vigus*, 4 Blackf. 260; *Railroad Co. v. Caster*, 13 Ind. 164; 3 *Sutherland on Damages* (2d Ed.) § 918; 6 Cyc. p. 525. But, considered in connection with 19, we see no grounds for the claim that the jury was misled.

For error of the court in giving to the jury instruction 15, the appeal must be sustained.

Judgment reversed, and cause remanded, with instructions to grant appellant a new trial.

THE PULLMAN COMPANY, Plff. in Err. v. STATE OF KANSAS *Ex Rel.* C. C. COLEMAN, Attorney General.

(Argued March 17, 18, 1909. Decided January 31, 1910.)

[30 Sup. Ct. Rep. 232.]

Commerce—License Tax on Foreign—Validity.—A foreign sleeping-car company cannot be restrained from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent of its entire capital stock, imposed by Kan. Gen. Stat. 1901, p. 280, for the benefit of the permanent school fund, as a condition of doing such business, since such requirement amounts to a burden or tax on the company's interstate business and on its property located and used outside the state.

In Error to the Supreme Court of the State of Kansas to review a judgment restraining a foreign sleeping-car company from doing local business in the state because of its refusal to pay the "charter fee" of a given per cent of its entire capital stock for the benefit of the permanent school fund of the state. Reversed and remanded for further proceedings.

See same case below, 75 Kan. 664, 90 Pac. 319.

The facts are stated in the opinion.

Messrs. Frank B. Kellogg, Charles Blood Smith, Francis B. Daniels, and Gustavus S. Fernald, for plaintiff in error.

Messrs. Fred S. Jackson and C. C. Coleman, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court:

This is a proceeding in quo warranto, instituted by the state in

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the supreme court of Kansas against the Pullman Company, a corporation of Illinois, in which the state, by its petition, prays that the defendant be required to show by what authority it exercises within Kansas the corporate right and power of charging compensation for the use of reserved seats in its cars by day and sleeping berths during the night, and of serving meals in its dining cars within the state of Kansas, such services, it is alleged, being rendered to and said fees being collected from passengers transferring upon railroads from places within the state to other places within the state; and that it be adjudged that the defendant has no authority of law for the performance of such corporate acts, powers, franchises, and business in the state of Kansas, and be ousted of and from the exercise within the state of the said corporate rights and franchises, and of receiving compensation therefor.

On the petition of the company the case was removed to the circuit court of the United States, but that court remanded it to the state court, where the defendant filed an answer resisting the relief asked on various grounds, one of which was that such relief could not be granted consistently with the power of Congress to regulate commerce among the several states, or with rights belonging to the defendant under the Constitution of the United States. A demurrer to the answer was sustained, and a decree rendered by which it was adjudged that the Pullman Company be ousted, prohibited, restrained, and enjoined from transacting, as a corporation, any business of a domestic or intrastate character within the state of Kansas. The decree declared that it should in nowise affect or restrict the interstate business of the company, nor affect any of its contracts, obligations, or corporate duties with or to the government of the United States.

The business of the Pullman Company, under its charter, was that of furnishing sleeping, parlor, and tourist cars on railroads, the company reserving to itself the right to charge a certain price for the use of reserved seats in such cars during the daytime and sleeping berths during the night. The company's business extended throughout the United States, where any trunk line railroad was operated. It is not necessary to go into detail as to the mode in which that business was conducted, further than to say that the business was and is principally that of interstate commerce.

This case arises under the statute of Kansas which was examined in *Western U. Teleg. Co. v. Kansas*, recently decided. [215 U. S. —, ante, 190, 29 Sup. Ct. Rep. 190] *Laws of Kansas*, Special Session, 1898, p. 30; *Kan. Gen. Stat.* 1901, title, "Corporations," p. 280; *Id.* 1905, same title, p. 284. The only provisions of that statute which need be recalled for the purposes of this opinion are these: "Each corporation which has received authority from the [state] charter board to or-

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ganize shall, before filing its charter with the secretary of state, as provided by law, pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of 1/10 of 1 per cent of its authorized capital, upon the first \$100,000 of its capital stock, or any part thereof; and upon the next \$400,000, or any part thereof, 1/20 of 1 per cent; and for each million or major part thereof over and above the sum of \$500,000, \$200. *

- * * In addition to the charter fee herein provided, the secretary of state shall collect a fee of \$2.50 for filing and recording each charter containing not to exceed ten folios, and an additional fee of 25 cents for each folio in excess of ten contained in any charter. The fee for filing and recording a charter shall also entitle the corporation to a certified copy of its charter. All the provisions of this act, including the payment of the fees herein provided, shall apply to foreign corporations seeking to do business in this state, except that, in lieu of their charter, they shall file with the secretary of state a certified copy of their charter, executed by the proper officer of the state, territory, or foreign country under whose laws they are incorporated; and any corporation applying for a renewal of its charter shall comply with all the provisions of this act in like manner, and to the same extent, as is herein provided for the chartering and organizing of new corporations." "Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state." Id. §§ 1264, 1267.

Proceeding under the statute of Kansas, the Pullman Company made written application to the charter board for permission to engage in business in that state. The application was granted, and the board made the following order: "The board having under consideration the application of the Pullman Company, a foreign corporation organized under the laws of the state of Illinois, for leave to transact the business of a sleeping car company in the state of Kansas; and it appearing that said foreign corporation has, in due form of law, filed with the secretary of state a certified copy of its charter, executed by the proper officers of the state of its domicil, and the written consent, irrevocable, of said corporation that actions may be commenced against it in the proper court of any county in this state in which the cause of action may arise, accompanied by a duly certified copy of the resolution of the board of directors of said corporation, authorizing the proper officers to execute the same, it is, upon motion, thereupon ordered that said application be granted, and that said applicant be authorized and empowered to transact the business of operating sleeping cars, dining cars, tourist cars, and other cars within the state of Kansas, and receiving money for such services, and transacting within the state its business of a sleeping car and transpor-

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tation company, provided, that this order shall not take effect and no certificate of such authority shall issue or be delivered to said company until such applicant shall have paid to the state treasurer of Kansas, for the benefit of the permanent school fund, the sum of \$14,800, being the charter fees provided by law, necessary to be paid by the corporation with a capital of \$74,000,000, seeking to transact business within this state. It is further understood, ordered, and provided that nothing herein contained shall apply to nor be construed as restricting in anywise the transaction, by said applicant, of its interstate business; but that this grant of authority and requirement as to payment relate only to the business transacted wholly within the state of Kansas."

We have seen from the provisions of the statute, as set forth in *Western U. Teleg. Co. v. Kansas*, that it is made a condition of the right of a foreign corporation seeking to do local business in Kansas, that it should apply to the state charter board for permission to do so. It is also prescribed as a condition of the right of a foreign corporation to do intrastate business in Kansas that it shall pay not only an application fee of \$25, but a charter fee "of 1-10 of 1 per cent of its authorized capital upon the first \$100,000 of its capital stock or any part thereof; and upon the next \$400,000, or any part thereof, 1-20 of 1 per cent; and for each million or major part thereof over and above the sum of \$500,000, \$200."

The Pullman Company is admittedly engaged, as it has been continuously for many years, in commerce among all the states of the Union, as well as in intrastate business in Kansas. The charter board, we have seen, gave it permission to engage in intrastate business in Kansas on condition that it should pay to the state treasurer for the benefit of the permanent school fund of the state, as a charter fee, the sum of \$14,800, which is the prescribed statutory per cent of the company's authorized capital, representing all of its property and interests everywhere, in and out of the state, and all its business, both interstate and intrastate. It does not appear how much of the single "fee" demanded by the state is to be referred to the interstate business of the company, nor how much of its property outside of the state, nor what part has reference to its intrastate business, or to its property within the state.

The Pullman Company refused to pay the fee so demanded, upon the general ground, among others, that the state could not, consistently with the Constitution of the United States or with the company's rights under the Constitution, make it a condition of its doing intrastate business in Kansas, that the company should pay, in the form of a fee, a specified per cent of all its authorized capital; that such a fee necessarily operated as a burden on the company's interstate business as well as a tax on its property interests outside of the state, and was hostile to its constitutional right of

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exemption from local taxation in reference to its property beyond the jurisdiction of the state.

For the reasons, and under the limitations, expressed in the opinion delivered in *Western U. Teleg. Co. v. Kansas*, and without expressing any opinion upon questions raised by the pleadings, but not covered by this opinion, we hold, 1. That the Pullman Company was not bound to obtain the permission of the state to transact interstate business within its limits, but could go into the state, for the purposes of that business, without liability to taxation there with respect to such business, although subject to reasonable local regulations for the safety, comfort, and convenience of the people which did not, in a real, substantial sense, burden or regulate its interstate business, nor subject its property interests outside of the state taxation in Kansas. 2. That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent of its authorized capital, was a violation of the Constitution of the United States, in that such a single fee, based as it was on all the property interests, and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state, and contribute from its capital to the support of the public schools of Kansas; that the state could no more exact such a waiver than it could prescribe as a condition of the company's right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law. 3. That a decree ousting and prohibiting the company from doing intrastate business in Kansas was improperly granted, the aid of the court should have been refused and the bill dismissed, because a decree such as the state asked would, in effect, have recognized the validity of a condition which the state could not constitutionally prescribe under the guise of a fee for permission to do intrastate business.

Mr. Justice MOODY heard the argument of this case, participated in its decision, and approves this opinion.

On the authority of *Western U. Teleg. Co. v. Kansas*, and for the reasons and with the reservations therein set forth in the opinion in that case, the decree must be reversed and the cause remanded for such further proceedings as may be consistent with this opinion.

It is so ordered.

GREEN v. LOUISVILLE & N. R. Co.

(Supreme Court of Alabama, Nov. 18, 1909.)

[50 So. Rep. 937.]

Carriers—Shipment of Goods—Delay in Transportation.*—The failure of a carrier to move a car load of lumber, after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Frank S. Green against the Louisville & Nashville Railroad Company. Defendant had judgment, and plaintiff appeals. Reversed.

Bestor, Bestor & Young, for appellant.

Gregory L. & H. T. Smith, for appellee.

MCCLELLAN, J. The appellant grounds this action for damages upon this omission of the appellee: In "wholly and carelessly" neglecting and "negligently" failing, "as was its [appellee's] duty in the premises," to remove, after notice and request so to do, a car of lumber belonging to appellant, in consequence of which breach of duty, it is averred, the lumber was destroyed in a fire that consumed the mill of the Crescent Lumber Company, whereat, or near which, the car was loaded, and at or near which the stated negligent omission of appellee permitted the car of lumber to remain and be destroyed. The only ground of demurrer assigned was that the "complaint shows that the negligence of the defendant complained of was not the proximate cause of the injury sued for." It is insisted by counsel for appellee that no prejudicial error could have attended the sustaining demurrer, because the complaint states no cause of action.

We cannot approve this contention. That it is the duty of a carrier to exercise due care and to employ reasonable diligence in the forwarding of goods committed to it for conveyance cannot be doubted. The complaint expressly avers that the duty of the defendant in the premises was to move said car, that notice and request so to do was communicated to defendant, and that defendant negligently omitted the performance of that duty, in consequence of which the lumber was destroyed. The argument that in the

*For the authorities in this series on the question whether the carrier is liable where freight is injured or destroyed while its transportation or delivery is being negligently delayed by the carrier, see foot-note of *Atchison, etc., Ry. Co. v. Henry* (Kan.), 31 R. R. R. 71, 54 Am. & Eng. R. Cas., N. S., 71; last foot-note of *French v. Merchants' & Miners' Transp. Co.* (Mass.), 30 R. R. R. 608, 53 Am. & Eng. R. Cas., N. S., 608.

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complaint no destination for the car is averred, no place whereto the defendant was obligated within its duty to remove the car, might (though we are not now invited to decide it) be in point, if a ground of demurrer had been interposed raising that objection to the complaint. It is sufficient to conclude that the complaint avers, expressly, a duty and its breach, and injury in consequence thereof. If the averment of these ordinarily essential elements in the statement of a cause of action are imperfect, demurrer should have been employed to point out the defects. Under the principles announced and applied in *L. & N. R. R. Co. v. Gidley*, 119 Ala. 523, 24 South. 753, and *A. G. S. R. R. Co. v. Quarles*, 145 Ala. 436, 40 South. 120; and the very recent decision in *A. G. S. R. R. Co. v. Elliott*, 150 Ala. 381, 43 South. 738, it must be held that the demurrer was erroneously sustained. The complaint makes a case where the carrier was culpable in its failure to move the car in question, and under such circumstances the destruction of the goods by fire, even though communicated without the carriers' other fault, will be traced in causation to the concurrent causes afforded by the fire and the negligent delay in the performance of the duty of removal.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

CHICAGO, R. I. & P. RY. CO. v. MILES.

(Supreme Court of Arkansas, Dec. 13, 1909.)

[123 S. W. Rep. 775.]

Carriers—Connecting Carriers—Interstate Shipment—Delay—Contract.—Under Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1909, p. 1167]), making a carrier liable for damages to an interstate shipment, caused on its own or a connecting line, and providing that no contract or regulation shall exempt it from such liability, an initial carrier is liable for its own negligence or that of connecting carriers resulting in delay in the transportation of cattle by reason of which they failed to reach their destination within a reasonable time, whether they were shipped under an oral or under a written contract attempting to limit the carrier's liability for its own acts or delays occurring on its own line.

Carriers—Transportation of Cattle—Delay—Circumstances Within Contemplation of Parties.*—Where a carrier contracted to transport

*For the authorities in this series on the subject of the right to recover special damages against a carrier of freight as affected by the carrier's knowledge or lack of knowledge of the urgency of the

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certain thoroughbred cattle to an auction sale with notice that the sale had been advertised for a particular day, it had no right to assume that the sale would continue from day to day, or that the cattle could be as profitably sold on a different day, and hence, in case of its negligent failure to deliver the cattle in time for the sale, it was liable for whatever damages the shipper suffered by a failure of the cattle to arrive in time for such sale.

Carriers—Shipment of Cattle—Delay—Particular Market—Damages.*—Where a carrier contracted to transport plaintiff's thoroughbred cattle for sale at a special auction, but negligently failed to do so, and there was proof that the cattle on hand at the auction did not exhaust the demand, the measure of damages was the difference between the price that could have been got for the cattle at the auction and the price plaintiff succeeded in getting for the cattle at private sale.

Carriers—Cattle Shipment—Delay—Act of God.†—Where cattle were shipped to be delivered in time for a particular auction sale, and, but for the carrier's prior delay, would have passed the point of an obstruction resulting from an act of God before the obstruction occurred, the fact that they were further delayed by such obstruction was no defense to the carrier's liability for the damages sustained.

Battle, J., dissenting.

Appeal from Circuit Court, Logan County; J. H. Evans, Judge.

Action by Oscar L. Miles against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The appellee sued appellant for damages which he alleged resulted to him by reason of the negligent failure of appellant to deliver a car load of Hereford cattle at Brady, Tex., on or before April 18, 1908. Appellee alleged that before entering into the contract with appellant to deliver the cattle at Brady he notified appellant that it was necessary for the cattle to be at Brady on or before the 18th of April, 1908, in order that they might be sold at a public auction sale to take place on that day, and that appellant with full knowledge of the purpose for which the shipment was being made contracted with appellee to transport and deliver the cattle. The appellee alleged that the negligent failure of appellant to comply with its contract caused appellee to lose the high market arranged for and provided by the auction sale, and that by reason thereof appellee was damaged in loss of value of the cattle amounting to \$1,200. The appellant denied the material allegations, and set up in defense that the cattle were shipped under a

shipment, or other special circumstances, see second foot-note of *Williams v. Atlantic C. L. R. Co. (Fla.)*, 33 R. R. R. 158, 56 Am. & Eng. R. Cas., N. S., 158.

†See foot-note of preceding case.

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contract which provided that appellant should not be liable for any loss or damage to the cattle that did not occur on appellant's line; that the cattle were not to be transported within any specified time, nor delivered at destination for any particular market, and that, in case of loss, appellant would be subjected only to a limited liability set forth in the contract. The evidence on behalf of appellee tended to show that in the year 1907 he, with a number of breeders of Hereford cattle in Texas, decided to hold an auction sale at Brady, Tex., which is located in the Middle Plains country and is distinctly a cattle country; that they advertised this sale extensively over four or five counties to take place on the 18th day of April, 1908; that he contributed to this sale 10 pure bred and registered bulls and 2 heifers; that he put these animals up in the previous September, and fed and carefully cared for them all through the previous winter; that they were in fine condition and weighed from 1,200 to 2,100 pounds; that when the time approached for the sale he wrote to the agent of the defendant, stating that he wished to ship his cattle from Booneville, Ark., to Brady, Tex., and ordered a car for them, and explained in detail the purpose and necessities of the shipment, and selected the route they should travel, and he and the agent, after a full discussion of all the details relative to this shipment, agreed that the cattle should leave Booneville on Monday the 13th, and by so doing they would reach Brady by the following Friday; that he explained to Mr. Briggs, the agent of the defendant, that he was unwilling to ship his cattle on a limited liability contract, and that he did not sign or authorize anybody else to sign for him any such contract; that the contract he had with the railroad company was an oral contract entered into by himself with the company; that he entered into no written contract; that Mr. Briggs, the agent of the defendant, agreed to put these cattle in Brady, Tex., in time for the sale; that he would not have shipped them if this agreement had not been made; that the agent of the defendant told him the cattle would get to Brady Wednesday morning or Wednesday night before the sale on Saturday; that he shipped his cattle from Booneville by way of Holdenville, Okl., and Ft. Worth, Tex., to Brady, Tex.; that the cattle failed entirely to reach Brady until more than a week after the sale; that his cattle were worth in that market and at that sale an average of \$200 apiece; that he had no market at his home in Arkansas for these cattle, and that after said cattle failed to reach Brady in time for the sale he managed to sell them at a private treaty and without the purchaser seeing them at \$100 apiece. There was evidence tending to show that the cattle did not reach Brady on the day specified because of the negligent delays in shipment by appellant and connecting carrier; that but for such delay the cattle would have passed the place en route and have been delivered before the unprecedented floods came that washed away a bridge which thereafter

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rendered it impossible to deliver the cattle at the place of destination in time for the auction sale.

The testimony on behalf of appellant tended to show that the cattle would have reached their destination on the Saturday morning of the day that the auction sale took place but for the fact that a certain bridge was washed away by unprecedented floods, which delayed their transportation for several days. The testimony for appellant tended to show that the written contract was the one entered into with appellee covering the shipment. The appellant introduced a written contract of shipment, signed by Briggs, appellant's station agent at Booneville, and by O. L. Miles. The evidence showed that the name of O. L. Miles was signed by J. T. Moore, who testified that he was to look after the shipment; that Miles sent him to deliver the cattle to the railway company, and to look after them while they were being transported. He signed Mr. Miles' name to the contract, and paid the freight charges, Miles having furnished him the money; that Miles never instructed him to sign a contract limiting the liability of the company for the loss of the cattle, etc. The contract contained a provision that each carrier's liability under the contract ceased upon delivery by it to its connecting carrier, and exempting the appellant as the initial carrier from loss occurring beyond its own line. It also contained a provision that cattle were not to be transported within any specified time, nor delivered at destination at any particular hour, nor in season for any particular market. There were provisions limiting the liability in case of loss to an amount not exceeding the sum named. There were also provisions by which the owner waived any cause of action for damages under prior verbal contract, and acknowledging that he had had the option between the contract at carrier's risk and the contract made. The court gave instructions on its own motion, to which appellant duly excepted, and refused prayers for instructions presented by appellant, and to the court's ruling in this particular appellant excepted. The law of the case will be commented on in the opinion.

The jury returned a verdict for \$1,036. The judgment was entered accordingly, and this appeal followed.

Thos. S. Busbie and Geo. B. Pugh, for appellant.

Robert G. White, for appellee.

WOOD, J. (after stating the facts as above). It is wholly immaterial under the evidence in this case whether the cattle were shipped under an oral or written contract. For, in either case, appellant would be liable for any damages to appellee caused through its negligence or negligence of connecting carriers. If appellant or connecting carriers failed to exercise ordinary care in the transportation of the cattle, resulting in delays by reason of which the cattle failed to reach their destination in a reasonable time after they were delivered to appellant for shipment, then ap-

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pellant would be liable to appellee in damages for whatsoever injury the latter sustained, as the direct and proximate result of such negligence. *St. Louis S. W. R. Co. v. Grayson & Seitz*, 89 Ark. 154, 115 S. W. 933.

2. The court did not err in admitting the evidence of appellee as to the amount of his damages by reason of the failure of appellant to deliver the cattle at Brady on the 18th day of April, 1908. Appellant had notice of the day of the sale, and of all the circumstances in detail as to why the sale was planned and fixed for the day. The sale was for a special purpose, and was extensively advertised for that day. Appellant, according to the evidence of appellee, had notice of all this, and made its contract with full knowledge that it was necessary to get the cattle to Brady for the sale on that day if appellee was to secure the benefit of that sale. Appellant had no right to assume that the sale would continue from day to day, or would be as profitable to appellee if made on some other day. No other day was thought of. That was the particular and only day. Having notice of the special damage that would result to appellee if he failed to get his cattle to that auction sale, and having contracted with appellee after such notice to deliver them for that sale, appellant cannot be heard to say that the damages appellee sustained by reason of the loss of that particular sale were not in contemplation of the parties to the contract. *Hadley v. Baxendale*, 91 Exch. 341. See *Western Union Tel. Co. v. Hogue*, 79 Ark. 33, 94 S. W. 924; *Western Union v. Raines*, 78 Ark. 545, 94 S. W. 700. The damages in such case is the difference in the value of the cattle as measured by what they would have sold for on the market at the auction sale, had the same occurred, and what they would have brought on the market at the same place and on the same day when not sold at auction. The proof is positive that the sale of the cattle that were on hand for the auction did not exhaust the demand for them when sold by that method. And that appellee's cattle were above the average of those that were sold at auction on that day at \$183 per head, and that his cattle, considering their superior quality, would have brought \$200 per head at the auction sale. But when sold on the market at private sale, he could only obtain \$100 per head for them. The facts bring the case well within the rule announced by the Supreme Court of Massachusetts and approved by this court in *Railroad Co. v. Planters' Gin & Oil Company*, 88 Ark. 87, 88, 113 S. W. 352, 355, as follows: "The damages for which a carrier is liable upon failure to perform his contract are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation; and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond in case of breach for special and exceptional damages." The court gave the jury a correct guide in ascertaining the measure of dam-

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ages, and the evidence warranted a larger sum than the jury found.

3. In the case of *St. Louis S. W. R. Co. v. Grayson & Seitz, supra*, we held that under the Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909]) the initial carrier is liable for damages to an interstate shipment of freight undertaken by it, whether the loss occurred on its own line or on the lines of connecting carriers. See, also, recent case of *Kansas City Southern Ry. Co. v. J. M. Carl*, 121 S. W. 932, where we held that the Hepburn act "renders invalid all stipulations limiting liability for losses caused by the carriers' negligence." These decisions rule the case at bar on the questions of limited liability under the written contract, conceding that the cattle were shipped under such contract, and in view of the above decisions the instructions of the court on this issue were more favorable to appellant than it was entitled to, and therefore it cannot complain.

4. The court in effect told the jury "that even if the cattle would have reached Brady in time for the auction sale but for the act of God, still if they were negligently delayed before reaching the obstruction, and but for such negligent delay would have passed beyond the point of obstruction before the obstruction occurred, the appellant would be liable." In the cases of *Martin v. Railway*, 55 Ark. 510, 19 S. W. 314, and *James v. James*, 58 Ark. 157, 23 S. W. 1099, there was a destruction of cotton by fire, an unavoidable accident, or, we may say, an act of God, and in those cases we said the failure to ship in the one case, and the failure to gain in the other, were of a series of events without which the loss would not have happened; but they were not the direct and proximate cause of the loss. But such is not the case here. The direct cause of the loss of the market of April 18, 1908, to appellee was the delay, as the evidence tended to show, of appellant. For, but for such delay, the cattle would have reached Brady in time for the sale. True, it may be said that they, having passed the river before the flood came, also would have reached Brady but for the act of God in washing away the bridge. The cattle were not destroyed by the flood as in the case of the cotton *supra*. In cases where there is a destruction of property by fire or flood, it is literally true that these agencies are the direct cause of the loss. Here the loss of the market was the delay of the cattle in reaching their destination in time. The two things that contribute to that delay were the negligence of the company and the act of God. Both combined in the case to produce the delay in getting the cattle to their destination in time. Both were the direct and proximate cause of the delay which resulted in the loss. The one was not the proximate, and the other the remote, cause of the loss, but the one concurred with the other in producing the delay in getting the cattle to the market,

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and this delay, continued until and after the day of sale, was the direct and proximate cause of appellee's loss and injury. The rule applicable here is announced in 1 Am. & Ency. L. pp. 595, 596, as follows: "Where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, the carrier is still responsible." See cases cited in note. See, also, 4 Ell. on R. R. § 1488. This is a typical case of concurring or commingling direct and proximate causes. See Hutchinson on Carriers (3d Ed.) § 297 (193) *et seq.*, where the varying views are stated, and the authorities to sustain them are cited. See, by analogy, *Marcum v. Three States Lumber Co.*, 88 Ark. 28-37, 113 S. W. 357; *Chicago Mill & Lumber Co. v. Cooper*, 119 S. W. 672. In *Rogers v. Missouri Pac. Ry. Co.*, 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, a carrier delayed the transportation of corn an unreasonable length of time, and after the corn reached its destination it was destroyed by an unprecedented flood. The Supreme Court of Kansas, in an exhaustive and able review of the authorities by Mr. Justice Burch, held that the carrier was not liable; that the intervening act of God was the direct and proximate cause of the loss. That case and the many cases cited by him to support the doctrine announced are exactly in line with our own decisions of *Martin v. Ry.* and *James v. James*, *supra*, where there was a total destruction of or injury to the property by the act of God operating upon it, and where the negligent delay was a mere incident of, but not the direct cause of, the loss. These cases are correct, for in such cases it cannot be reasonably anticipated when the contract is entered upon that a negligent delay would bring the property within the operation of an act of God that would damage or destroy it. Such occurrence could not be reasonably foreseen and guarded against, and therefore there is no liability in such cases, because the loss is produced by the intervening act of God as the direct and proximate cause. But in cases like this, where the party contracts to deliver property at a certain time, the delay on his part that actually causes the result that the parties had expressly contracted should not take place, as in the case at bar—the loss of the market—is certainly a direct and proximate cause of that result, and not a mere incident or remote cause of it. And it matters not that there may be also other concurring or commingling causes that also contributed directly to produce the delay. For it must not be forgotten that the loss of this market was caused by the delay, and not by the act of God. In one such case as the *Martin*, *James*, and *Rogers Cases*, *supra*, the loss is caused directly by the act of God, and not the delay.

Judgment is affirmed.

BATTLE, J., dissents.

AMANN v. CHICAGO' CONSOL. TRACTION CO.

(Supreme Court of Illinois, Dec. 22, 1909. Rehearing Denied Feb. 3, 1910.)

[90 N. E. Rep. 673.]

Damages—Personal Injuries—Evidence—Loss of Earnings.—Though there is evidence in an action for personal injuries that plaintiff's employer hired him because of friendship, evidence as to his wages before his injury is admissible, without proof of his qualifications, or that his services were worth what he received.

Damages—Personal Injuries—Evidence—Medical Treatment.—To entitle plaintiff, in an action for personal injuries, to recover expenditures for medical treatment, it is necessary to show that such services were necessary because of the injuries, and that the fees were reasonable.

Damages—Personal Injuries—Evidence—Extent of Injury.—To justify a recovery for future pain or suffering, proof of a reasonable certainty that they will be endured in the future is necessary.

Damages—Remission of Excess.—The error of admitting improper evidence as to the amount of damages, which did not affect the question of defendant's liability for the personal injuries sued for, is cured by a remittitur.

Carriers—Injury to Passenger—Exemplary Damages.*—Exemplary damages may be recovered against a carrier for injuries to a passenger resulting from an assault by the conductor.

Appeal from Branch Appellate Court, First District on Appeal from Circuit Court, Cook County; John Gibbons, Judge.

Action by Henry R. Amann against the Chicago' Consolidated Traction Company. A judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

John A. Rose and Frank L. Kriete (W. W. Gurley, of counsel), for appellant.

Morgan & Rubenstein (Bowles & Bowles, of counsel), for appellee.

CARTWRIGHT, J. This is an action on the case begun in the circuit court of Cook county by appellee for an alleged malicious and wanton assault upon him, while a passenger on a street car of appellant, by the conductor. On the trial the plaintiff testified that he was a passenger on the car, and, desiring to get off, signaled his intention to do so, but the car did not stop, and he pulled

*For the authorities in this series on the subject of the right to recover punitive or exemplary damages for wrongs to passengers, see foot-note of Cincinnati, etc., Ry. Co. v. Stosnider (Ky.), 33 R. R. 235, 56 Am. & Eng. R. Cas., N. S., 235.

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the bell cord, whereupon the conductor ran back on the footboard to the place where the plaintiff was sitting, took him around the neck, and threw him off the car, and both fell to the ground, and the conductor used obscene language toward him. The defendant offered no evidence, but on the trial endeavored to ascertain the name of the conductor, or identify him in some way, and it was admitted that the officer or agent of the defendant who had charge of all the records, reports, and information regarding all accidents and occurrences of the nature of this one had not, and never did have, any report of the occurrence. The jury returned a verdict for \$5,525. On motion for a new trial the court ruled that a new trial would be granted unless a remittitur of \$2,025 should be entered, whereupon the plaintiff entered the remittitur, and judgment was entered for \$3,500. The Branch Appellate Court for the First district affirmed the judgment, and from that judgment this appeal was taken.

Prior to October 12, 1900, the plaintiff had been a musician, playing the banjo and guitar, and performing at parties, weddings, and hotels, and on that date he suffered a paralytic stroke of his whole left side. He was thrown from the street car on July 25, 1903, and had been a paralytic nearly three years. He was treated for the paralysis, but was unable to work or earn anything until January, 1902, when he went to work for Mr. Lang, a florist. Lang came from the same country, and was an old acquaintance and friend, and on account of his friendship employed the plaintiff to do such work as he could do. When working for Lang, he attended to the books and plants, bought roses and flowers at wholesale, and did other work which did not require the use of his left hand. He worked until the last of June, 1902, and laid off in July and August, during the dull season in the flower business, but began work again on September 1, 1902, and worked until the last of June, 1903, when he again laid off for July and August. He expected to go back to work again the 1st of September, and he was permitted to testify, against the objection of the defendant, that he earned \$75 a month by working for Lang. It is contended that such testimony was incompetent without proof of his qualifications for the work he did, or that his services were equal in value to what he received, for the reason that Lang employed him on account of friendship. The plaintiff testified that he performed his duties satisfactorily to Lang, and we do not think the evidence raises any presumption that Lang intended to or did make any gift to the plaintiff under the form of wages. The ruling of the court was not erroneous.

The plaintiff was also permitted to testify that he had paid \$800 since the street car occurrence for doctors' bills and treatments, without giving any particulars of amounts or persons to whom the moneys were paid, and without proof that the treatments were necessary on account of the injuries for which he sued.

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To enable the plaintiff to recover for expenditures for medical services it was necessary for him to prove that such services were made necessary because of the injury inflicted by the defendant, and that the fees were reasonable for the services. *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899. While he was not required to furnish an itemized account, it was necessary to show what he paid, and to whom, and he was not able to state, even in a general way, to whom he paid the moneys, or to give any particulars of the treatments or services. There was an entire absence of any evidence tending to show that the medical services were necessary on account of the injuries for which the suit was brought, or, in fact, that plaintiff suffered any substantial or lasting injury at all. The court erred in overruling the objections.

The only injuries to the plaintiff were an abrasion of the skin on the left arm and a slight sprain of the ankle on the paralyzed side. A doctor, who examined the plaintiff after the occurrence and treated him a number of times for these injuries, was asked to state what effect they would have on the paralytic part of the body. He replied that he was not an expert, and defendant then objected to the question. The court ruled that the witness must answer, and the witness said he could not give definitely the effect afterwards. The defendant again objected, and the court said that the witness might give his opinion, and asked the witness if he had an opinion. The witness replied that he had no opinion as to the after-effect, and the court said that then he need not give an opinion. The witness was then asked if the abrasion would tend to make the paralysis worse or aggravate it, and he answered that it might aggravate it. On motion to strike out the answer the court ruled that it might stand, and, the witness being asked what would be the probabilities, he said he could not tell. These rulings were wrong. A mere possibility, or even a reasonable probability, that future pain or suffering may be caused by an injury, or that some disability may result therefrom, is not sufficient to warrant an assessment of damages. It would be plainly unjust to require a defendant to pay damages for results that may or may not ensue, and that are merely problematical. To justify a recovery for future damages the law requires proof of a reasonable certainty that they will be endured in the future. *Lake Shore & Michigan Southern Railway Co. v. Conway*, 169 Ill. 505, 48 N. E. 483; *Chicago & Milwaukee Electric Railway Co. v. Ullrich*, 213 Ill. 170, 72 N. E. 815; *Chicago City Railway Co. v. Henry*, 218 Ill. 92, 75 N. E. 758; 6 Thompson on Negligence, § 7318; 13 Cyc. 138-144.

Notwithstanding these errors, we are of the opinion that the judgment should not be reversed. The errors did not in any manner affect the question of the liability of the defendant, in which case a remittitur would be of no avail to obviate them (Wa-

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bash Railway Co. *v.* Billings, 212 Ill. 37, 72 N. E. 2), but they related only to the amount of damages. While the defendant had a right to the judgment of the jury as to the amount of damages on legitimate evidence, it has frequently been held that an error affecting damages only may be cured by a remittitur. Whether the remittitur required by the trial court would cure errors of this character on a question of actual damages or not, we are satisfied that any jury to whom the evidence in the case might be presented would assess damages equal to the amount of the judgment. The case was a proper one for the assessment of exemplary damages (*Chicago Consolidated Traction Co. v. Mahoney*, 230 Ill. 562, 82 N. E. 868), and in view of that fact we think the judgment should be affirmed.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

WEIR et al. v. ROUNTREE.

(Circuit Court of Appeals, Eighth Circuit, October 28, 1909.)

[173 Fed. Rep. 776.]

Commerce—Negligence of Carrier—Liability—Law Governing.—

The liability of a railroad company for an injury resulting from its negligence, in the absence of any controlling federal statute relating to interstate commerce, is governed by the law of the state where the injury occurred, whether statutory or the common law as construed by its courts.

Carriers—Liability for Negligence—Injury to Express Messenger—Contracts Limiting Liability.*—Under the provisions of Gen. St. Kan. 1901, §§ 5857, 5858, making railroad companies liable for all damages to persons or property caused by their negligence, and for injuries to employees through their negligence or that of other employees, which, as construed by the Supreme Court of the state, render void any contract limiting such liability, a contract between an express company and a railroad company that the former shall indemnify and save the latter harmless against any liability on account of the injury or death of any employee of the express company while in the cars or about the platforms of the railroad company, whether resulting from its negligence or otherwise, and a second contract between the express company and an employee by which the employee assumes all risks of accidents or injuries while riding on the cars of any railroad, and expressly ratifies the contract between the express company and railroad company, and agrees to save the express company harmless from any liability thereon, where-

*See first foot-note of *Sewell v. Atchison, etc., Ry. Co.* (Kan.), 30 R. R. R. 86, 53 Am. & Eng. R. Cas., N. S., 86.

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ever such contracts were made, are not available as a defense to an action against the railroad company by the widow of the employee to recover damages for his death, occurring in Kansas through the alleged negligence of the railroad company.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Suit in equity by Levi C. Weir, W. H. Damsel, and Charles Steele, president and trustees of the Adams Express Company, against Amy J. Rountree. Decree for defendant, and complainants appeal. Affirmed.

E. L. Scarritt (William C. Scarritt and Elliott H. Jones, on the brief), for appellants.

Eugene F. Ware (Biddle & Lardner, Edwin Frieze, and Ware, Nelson & Warc, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. In this case complainants, as president and trustees of the Adams Express Company, filed their bill in the Circuit Court against Amy J. Rountree, alleging that the Adams Express Company entered into a contract with the St. Louis & San Francisco Railroad Company, whereby the railroad company engaged to transport express matter for the Adams Express Company over its line of road, and the employees having charge of the express matter should be transported over the road, for a consideration named, and it was a part of the contract between the said express company and the railroad company that the—

"said express company should indemnify and save harmless the said railroad company from all claims, demands, damages, actions, costs, and charges to which the said railroad company may be subject, or which it may be required to pay by reason of any injury or loss of life suffered or sustained by any agent or employee of the said express company while in, upon, or about any of the cars or station platforms of the said railroad company, whether said injuries or loss of life arise from the negligence of the employees of the said railroad company or otherwise."

The bill further alleged that in January, 1904—

"one H. R. Rountree entered into an agreement in writing with the said express company at the city of Omaha, in the state of Nebraska, for his employment with it as an express messenger, whereby the said Rountree did express and agree that, whereas, the duties of said employment may require that he should be in, upon, or about, or travel on, the cars and conveyances of certain railroad companies and that the said railroad companies require of the said express company as a condition of their permitting said Rountree to be in, upon, or about, or travel on, their cars

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in the performance of said duties, that they should be indemnified by said express company against and released from all liability for and in respect of any damage or injury which might be sustained by the said Rountree, or for his death, in the course of such employment, whether same be occasioned by the negligence of said railroad companies or otherwise, in consideration of the premises and of his employment as aforesaid at a stipulated rate of compensation he, the said Rountree, did assume all risks of accidents and injuries which he might meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation engaged in operating any railroad, or of any employee of any such corporation, or otherwise, and whether resulting in his death or otherwise, and did thereby expressly agree to indemnify and save harmless the said express company of and from any and all claims which might be made against it at any time by any corporation under any agreement which the said express company had theretofore made or might thereafter make, arising out of any claim or recovery by him, the said Rountree, on his part, or by or on the part of his representatives, or any damages sustained by him or them by reason of any injury to him or by reason of his death, whether such injury or death resulted from the gross negligence of any such railroad corporation or any employee of any such corporation or otherwise, * * * and he did thereby expressly ratify all agreements theretofore made by the said express company with any corporation owning any railroad, and especially the said contract hereinbefore mentioned between the said express company and the said St. Louis & San Francisco Railroad Company, relative to the ultimate liability of the said express company to save said railroad company harmless from damages occasioned to the said Rountree through the negligence of the said railroad company or its employees, and he, the said Rountree, did expressly agree to be bound by said agreement as fully as if he were a party thereto."

The bill further alleges that while he was upon the St. Louis & San Francisco Railroad, in charge of certain express matter being carried and conveyed upon the line of said road, and while the said train was near the city of Columbus, in the state of Kansas, on or about February 14, 1906, said train and the car in which the said Rountree was being carried and conveyed as aforesaid was wrecked, and thereby the said Rountree was so injured that his death resulted therefrom a short time thereafter. The bill further alleges that the defendant Amy J. Rountree, widow of said H. R. Rountree, deceased, has commenced an action in the district court of Cherokee county, Kan., against said St. Louis & San Francisco Railroad Company, to recover the sum of \$10,000 as her damages alleged to be sustained by reason of the death of said H. R. Rountree, caused by the negligence of

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said railroad company and its employees, etc. The bill further alleges that the railroad company, in its answer in said action, set forth the contract referred to between the said railroad company and the said express company, and the contract between the express company and said H. R. Rountree, but that the district court of Cherokee county, Kan., has sustained a demurrer to said answer, holding that such contracts were void and did not constitute a defense to said action.

Complainants in their bill pray that the court order and decree that the defendant Amy J. Rountree execute and deliver to the said St. Louis & San Francisco Railroad Company a good and sufficient release, under hand and seal, of all claims, demands, and causes of action arising out of the injury or death of the said H. R. Rountree, hereinbefore referred to, or connected with or resulting therefrom, to be of the same force and effect as though the same had been executed by the said H. R. Rountree under his hand and seal during his lifetime, and that a writ of injunction issue, commanding the said Amy J. Rountree, her agents and attorneys, and all persons claiming to act under her authority, direction, or control, to absolutely desist and refrain from prosecuting her said claim against the St. Louis & San Francisco Railroad Company in the district court of Cherokee county, Kan.

To the bill thus filed by complainants the defendant answered, in which she admitted the contract between the express company and the railroad company and the contract between the express company and said H. R. Rountree, exactly as stated in the bill of complaint. Other allegations as to jurisdiction, etc., were admitted. The answer contained the following allegation:

"The defendant says that part of the services of the said H. R. Rountree, besides those of express messenger, as stated in complainant's bill, were the duties of baggage master of the train on which he was employed; that the express company property was carried in the baggage car, and that he not only had charge of the express matter, but also of all of the baggage on the train, consisting of the trunks and property of the passengers, carried in the said baggage car; and that it was part of his duty and employment to care for and handle said baggage. Wherefore defendant alleges that he was an employee of the railroad company, as such baggage master, which was a duty and service separate from the express business, and no part thereof. The defendant says that the said Rountree was killed by, through, and on account of the gross negligence of the said railroad company while he was in its employ as baggage master as aforesaid. Suit was brought on October 5, 1906, against said railroad company in the district court of Cherokee county, Kan., a court of general jurisdiction, by this defendant, setting forth that the death of the said Rountree was caused by the gross negligence of the said railroad

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company in the operation of its trains, and took place while he was in the express and baggage car of the railroad company, in charge of the express matter and of the baggage of the said train, and in the employ of the said express company and in the employ of the said railroad company as baggage master as aforesaid in the said car."

Other allegations were contained in the answer, which are unnecessary to be considered here.

Complainant did not file a replication to said answer, but, on the 7th day of May, 1909, filed a motion as follows (after entitling the case):

"Now come the plaintiffs in the above-entitled cause and respectfully move the court to enter a decree in this cause in their favor, conformable to the prayer of the bill of complaint, upon the allegations of the said bill of complaint and of the admissions and statements of fact contained in the answer of the defendant, for the reason that upon the facts so established the plaintiffs are entitled to the relief prayed for."

Hearing was had on the 8th day of May, and a decree entered that plaintiffs were not entitled to the relief prayed for, from which decree the plaintiffs have taken this appeal.

One reason why plaintiff is not entitled to the relief asked is that the injury and death occurred in the state of Kansas, and the rights of the widow are to be measured according to the laws of that state. We need not stop to inquire whether or not the contract in question was valid according to the laws of Nebraska, where executed, as the widow is not basing her action upon such contract, but upon the statute law of Kansas. Whether such contract is available as a defense to her action we think determinable according to the laws of Kansas.

Penn. R. R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, was a case in which the plaintiff shipped a horse from Albany, in the state of New York, to Cynwyg, in the state of Pennsylvania. The bill of lading contained a clause limiting the carrier's liability to a stipulated value in consideration of the rate paid, the shipper having been offered a bill of lading without such limitation on payment of a higher rate, but he signed a memorandum accepting the contract at the lower rate. The horse was injured in the state of Pennsylvania by reason of the negligence of the carrier. The owner brought suit in the state of Pennsylvania, and the common law, as administered in Pennsylvania, held that such limitations in the contract were invalid. In the state of New York, where the bill of lading was issued, such limitation was valid. The Supreme Court held that the question was a local one, to be administered according to the law of the state where the injury occurred, and, in the absence of a statute, prohibiting limitations of that character in the contract, it was to be governed by the common law, as construed

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by the courts of that state. It was further held that, as Congress had not, in the exercise of its power over the interstate commerce, legislated with respect to such contracts, that it was open to the states to determine the validity of such a contract. The court cited the case of Chicago, Milwaukee, etc., R. R. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, and quoted therefrom the following:

"A carrier exercising his calling within a particular state, although engaged in business of interstate commerce is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits. * * * The rule prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law."

The court then said:

"We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, *a contract to the contrary notwithstanding.*" (Italics our own.)

Martin v. Pittsburg & Lake Erie Ry. Co., 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, was a case in which a postal clerk was injured by reason of the derailment of a train in Pennsylvania. The statute in that case provided:

"When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee, provided that this section shall not apply to passengers."

It was held that it was a local question, for the state to determine, whether or not the postal clerk was a passenger, and as to the validity of a statute of that character.

Sections 5857 and 5858, Gen. St. Kan. 1901, are as follows:

"Sec. 5857. That railroads in this state shall be liable for all damages done to persons and property, when done in consequence of any neglect on the part of the railroad companies.

"Sec. 5858. Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage."

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The Supreme Court of that state, construing these sections, have held that a railroad company could not contract in advance for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in that state, and that a contract in contravention of this statute was void. *Kansas Pac. Ry. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 59 Kan. 437; 53 Pac. 461. In the latter case it was said:

"It is an action instituted by his widow, as administratrix, under section 418, Gen. St. 1897, for the benefit of herself and the children of the deceased. It is to recover their damages resulting from the death of the husband and father. It is to recover for the injury to them, rather than to the deceased. Against their rights the deceased had no authority to contract. The cause of action for which the plaintiff sues never accrued to him. It could only accrue as a result of his death. His stipulation, even if binding on himself, is no defense against the statutory right of the plaintiff."

Again, it is apparent from the facts that it was not contemplated that the contract of employment between Rountree and the express company should be wholly performed within the state of Nebraska, where the contract of employment was entered into, but that the service to be rendered was to be in different states. For that reason we think the law of the place of performance, and where the cause of action accrues, should govern. *Stone v. U. P. R. R. Co.*, 32 Utah, 185, 89 Pac. 715. To illustrate: Suppose a railroad company operating a line of road in two or more states should employ A. to render service for it as a brakeman, the contract of employment being made in a state in which A. could recover from the railroad company for an injury caused by the negligence of a fellow servant, and he should sustain an injury in a state in which recovery could not be had because of the negligence of a fellow servant. We do not think that it could be successfully contended in such case that, because the contract was made in the state in which the recovery could be had, it would operate to give him a cause of action in the state where the injury took place, contrary to the laws of such state; and the converse of the rule must also be true.

For the foregoing reasons, plaintiff is not entitled to the relief prayed, and the decree is affirmed.

LEE *et al.* v. NEW ORLEANS GREAT NORTHERN R. CO.

(Supreme Court of Louisiana, Jan. 3, 1910. Rehearing Denied Jan. 31, 1910.)

[51 So. Rep. 182.]

Carriers—Appeal and Error—Separate Accommodations—"Colored Race"—Evidence—Review.—Act No. 111, p. 152, of 1890, requires railroad companies to provide equal, but separate, accommodations for "the white and colored races," and makes it a misdemeanor for any train officer to assign a passenger to a coach or compartment other than the one set aside for persons of his race.

Where plaintiff sued for damages on the ground that two of his children, born of white parents, had been unlawfully assigned by the conductor of defendant's train to a coach set apart for colored persons, held, that the burden of proof was on the plaintiff to establish that his children belonged to the white race, and that, under the statute, any person who has any applicable mixture of negro blood belongs to the "colored" race; and held, further, that a judgment rendered in favor of the defendant on conflicting evidence as to the status of plaintiff's children would not be disturbed, when not clearly against the preponderance of the evidence.

(Syllabus by the Court.)

Appeal from Twenty-Sixth Judicial District Court, Parish of St. Tammany; Thomas M. Burns, Judge.

Action by Sam Lee and others against the New Orleans Great Northern Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Thos. M. Bankston, Hypolite Mixon, and Prentiss B. Carter, for appellants.

Benj. M. Miller and Lindsay McDougall, for appellee.

LAND, J. Sam Lee and his wife sued for \$15,000 damages, in behalf of themselves and their minor daughters, Edith and Belle, aged, respectively, 16 and 14 years. The cause of action, briefly stated, is that said minors, being white children born of white parents, while passengers on one of defendant's trains and seated in a coach set apart exclusively for white people, were illegally and wrongfully ordered by the conductor of said train to leave said coach and go into the coach set apart exclusively for negroes, and that on their refusal so to do the said conductor ejected them from said train at a station some eight miles distant from their destination, to the great mortification and humiliation of the petitioners.

The defendant, first excepting that the said Edith and Belle are not the legitimate children of the plaintiff, answered that they were colored persons, and that the conductor, so believing, re-

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quested them to leave the white coach and to go into the car reserved for negro passengers, which the said girls did without objection, and that they voluntarily left the train at Ramsey, without being required or requested to do so by the said conductor or any other employee of defendant.

On the prayer of the plaintiffs the case was first tried before a jury, which failing to agree, a mistrial was entered. Thereupon counsel for plaintiffs waived trial by jury, and by consent the case was tried before the court.

Plaintiffs have appealed from a judgment in favor of the defendant.

The trial judge found as a matter of fact that the two girls were "colored," or, in other words, of African descent, on the maternal side.

Act No. 111, p. 152, of 1890, requires railway companies to provide equal, but separate, accommodations for the "white and colored races," and train officers to assign each passenger to the coach or compartment used for the race to which such passenger belongs. The same statute makes it a misdemeanor for any passenger to insist on going into a coach or compartment to which by race he does not belong, and for any train officer to insist on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, and further provides that, should any passenger refuse to occupy the coach or compartment to which he is assigned, the railway officer shall have power to refuse to carry such passenger on his train.

The word "colored," as used in the statute, is a term specifically applied in the United States to negroes or persons having an admixture of negro blood. See Webster's Int. Dict. verb. The same word is often applied to black people, Africans or their descendants, mixed or unmixed, and to persons who have any applicable mixture of African blood. 7 Cyc. 400, 401.

One hundred years ago, in the territory of Orleans, the term "persons of color" was used to designate people who were neither white nor black. In *Adelle v. Beauregard*, 1 Mart. (La.) 184, decided in 1810, the Superior Court of the said territory said:

"Persons of color may have descended from Indians on both sides, from a white parent, or mulatto parents in possession of freedom."

In that case the court held that the plaintiff, being a person of color, was presumed to be free, and that in case of blacks the presumption was that they were slaves. During the regime of slavery all free persons of African descent were styled "free people of color" or "free colored persons." Civ. Code 1825, arts. 95, 2261; Act No. 308 of 1855. Article 95 of the Code of 1825 interdicted marriage between free persons and slaves, and between free white persons and free people of color. The first restriction fell with

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the abolition of slavery, and the second was repealed by the Civil Code of 1870.

But by Act No. 54, p. 63, of 1894, marriages between white persons and persons of color were again prohibited.

By Act No. 87 of 1908 concubinage between a person of the Caucasian or white race and a person of the negro or black race was made a felony.

Act No. 111 of 1890 draws a sharp line of distinction, without a margin, between the white and colored races in the matter of separate accommodations on railroad trains. Ever since the first settlement of Louisiana all persons with any applicable degree of negro blood have been considered as colored; that is to say, as belonging to the African race. Many free persons of color owned slaves and other property. But between that class of people, however light in color, and the whites, the color line was strictly drawn, both socially and politically. The lawmaker never applied the term "colored" to slaves, but since emancipation that term has been used as synonymous with negro. Among slaves the word "negro" or "nigger" was considered as a term of reproach, and they usually spoke of themselves as "colored." This nomenclature has survived, and has become a popular term, embracing all persons of negro blood.

The plaintiff's cause of action is based on the allegation that his two daughters are white children born of white parents. The evidence adduced on the first trial failed to satisfy three-fourths of a jury of the vicinage of the truth of the allegation. The second trial before the court resulted in a judgment that plaintiff's children were colored persons.

The plaintiff, Sam Lee, is undoubtedly a white man. He was married to Adaline Baham before a justice of the peace in February, 1889. At that time marriage between whites and persons of color were lawful, and it results that, in any view of the case, the children of such marriage are legitimate.

The solution of the question of color depends on the status of Norah, Nory, or Abraham Baham, the father of Mrs. Lee, who died some 20 or 25 years ago. It is admitted that Norah Baham was of mixed blood, but whether he was of Indian or African descent is the contested issue of fact in the case.

No useful purpose would be subserved by recapitulating the conflicting evidence adduced on this issue in the court below. Suffice it to say that the finding of the trial judge is sustained by the testimony of a number of witnesses who knew Norah Baham before and after the late Civil War. It is true that there is much counter testimony; but it is not sufficient to justify us in reversing the judgment as clearly erroneous on a pure question of fact.

The petition charges the defendant company with the violation of a penal statute, and the burden of proof was on the plaintiff to establish the essential facts necessary for a recovery of the dam-

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ages claimed, to wit, that his children belonged to the white race, and were unlawfully assigned to a coach or compartment set apart for colored persons. One who charges another with a culpable breach of duty must prove the fact, though it involves a negative. 1 Hennen's Digest, pp. 495—497. On the question of race there is no legal presumption either way. The issue was one purely of fact, to be determined not only by evidence of the admixture of negro blood, but by evidence of reputation, of social reception, and of the exercise of the privileges of a white man. *White v. Tax Collector*, 3 Rich. Law (S. C.) 136.

Judgment affirmed.

ATCHISON, T. & S. F. RY. CO. v. JANDERA.

(Supreme Court of Oklahoma, June 8, 1909.)

[104 Pac. Rep. 339.]

Railroads—Injuries to Persons at Stations—Implied Invitation.*—

One passing along a recognized way leading from a public street over the station grounds of a railroad company to its station platform, for the purpose of mailing a letter on one of defendant's trains, is there by implied invitation of defendant.

Railroads—Injuries to Persons at Stations—Persons Mailing Letters on Trains.†—It is the duty of a railroad company which carries mail under contract with the United States, and by whose regulation postal clerks on mail trains are required to receive mail matter on the mail car while stopping at stations along its route, to use reasonable care to keep in a reasonably safe condition a recognized way over its grounds to its station platform, and a failure so to do, resulting in personal injury to one passing along said way for the purpose of mailing a letter on one of defendant's mail trains upon its arrival, is actionable negligence.

(Syllabus by the Court.)

Error from District Court, Noble County; Bayart F. Hainer, Judge.

Action by Frank J. Jandera against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*See last foot-note of *Arkansas & L. Ry. Co. v. Sain* (Ark.), 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579; last foot-note of *St. Louis, etc., R. Co. v. Lavendusky* (Ark.), 32 R. R. R. 97, 55 Am. & Eng. R. Cas., N. S., 97.

†See last paragraph of first foot-note of *Franev v. Union Stockyard & Transit Co.* (Ill.), 31 R. R. R. 357, 54 Am. & Eng. R. Cas., N. S., 357.

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Henry E. Asp, Charles H. Woods, and George M. Green, for plaintiff in error.

Henry S. Johnson, for defendant in error.

TURNER, J. This is an action to recover damages for personal injuries brought by Frank J. Jandera, defendant in error, plaintiff below, on November 11, 1905, against the Atchison, Topeka & Santa Fé Railway Company, plaintiff in error, defendant below, in the district court of Noble county. The petition substantially states that defendant owns and operates a line of railway through the city of Perry in this state, with its main track, side tracks, and station grounds within said city; that said grounds are bounded on the north by C street and on the south by B street; that on September 28, 1905, upon said grounds, and a few feet north of B street and defendant's passenger depot, defendant did have, keep, and maintain a "dangerous" hole, about 6 feet wide, 6 feet long, and 7 feet deep, walled with stone; that several weeks prior to said date defendant negligently kept said hole open, exposed, and uncovered, and failed, neglected, and refused to guard or cover same, or place a light or other warning at or in its vicinity; that defendant being wholly unaware of its existence, and that the line of travel from B street to the depot grounds was in any manner obstructed, and desiring to go from B street to the depot grounds on business, did, about half past 10 o'clock at night, pass along B street and upon the premises of defendant, and fall headfirst into said hole, to his damage of \$13,120, for which he prays judgment. For answer defendant filed a general denial; alleged that plaintiff's said entry upon its right of way was without license, permission, invitation, or knowledge of defendant; that at the time plaintiff was a trespasser, and was injured as a result of his own recklessness and want of due care, and without any negligence or want of due care on the part of defendant. There was trial to a jury, which resulted in a judgment for plaintiff for \$820, and, after motion for a new trial filed and overruled, defendant brings the case here by petition in error and case-made for review.

As the chief assignment of error is that the court erred in refusing to instruct the jury to return a verdict in favor of defendant, we will determine whether the evidence was sufficient to take the question of negligence to the jury. Resolving all controverted questions of fact in favor of plaintiff, the evidence discloses that defendant's railroad runs through Perry on a straight line north-east and southwest, crossing B and C streets running east and west. Sixth street, being the first running north and south, west of its trackage between B and C streets, consists of a main track and two side tracks a few feet east and a house track some 60 feet west of the main track. Between the main track and house track and near C street is its depot facing the main track, with a platform 16 feet wide, extending along said track from C street to

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within about 20 feet of the north line of B street. That the usual avenue of approach to said depot and platform was from C street. That for years, and until a short time prior to the injury complained of, pedestrians were in the habit of passing to and from the south end of said platform over a strip of land from B street between the main and house tracks, and, for the purpose of unloading freight from cars standing on said house track, wagons were in the habit of driving from B street northward along the west of said track, and between it and said platform. Teams also approach said track and platform from C street west of the freight house, which was about midway between said streets and west of said house track. That a short time prior to the injury complained of defendant, preparatory to erecting a water tank at the south end of said platform, caused a pile of brick to be placed south of its south end in B street, a few feet south of its north line, around a signpost marked "Railroad Crossing," also a long pile of crushed rock some 2 or 3 feet high west of said pile of brick and east of, and within a few feet of, said house track, and between the south end of said platform and the north line of B street caused a circular excavation to be made some 20 feet in diameter, and filled the same with crushed rock to an elevation of some 2 feet, and within about 4 feet of said main track. It also caused to be dug upon its said right of way, close to the circular foundation, and within 10 feet of the north line of B street, and about 35 feet from the center of said main track, a frost box 4 feet 4 inches square and 5 or 6 feet deep walled with stone, said walls projecting several inches above the ground. That said obstacles so placed completely cut off approach to said platform from B street across the strip of land aforesaid, except by pedestrians. These were the physical conditions on defendant's right of way at the scene of the injury on the night it occurred. Plaintiff on that night arrived in Perry from his home in the country about 7:30 p. m. About 10:30 p. m. he, desiring to see a friend at the electric light plant located in the south city limits and east of these tracks, started from the corner of C street, passed south along Sixth street nearly to B street, where, for the purpose of mailing a letter on defendant's passenger train carrying the south-going mail, which he thought was about due, turned east and crossed lots to B street, passed along said street near to a point thereon intersected by defendant's main track, and stopped at said sign marked "Railroad Crossing," and, seeing to the north what he thought to be the light of the train, attempted to reach said platform by passing to the right around said circular foundation, and stumbled and turned on his way to said platform around said circular foundation to the left, fell over the projecting wall of said open frost box and into the same, the existence of which was unknown to him, and which was not guarded, nor its presence indicated by light or signal of any kind, and was seriously injured.

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In support of its contention it is urged by defendant that at the time of his injury plaintiff, not being upon its right of way by defendant's invitation, express or implied, but for the purpose of mailing a letter on the train, which was a matter of his own convenience, was a trespasser, or at most a licensee, toward whom defendant owed no duty except to refrain from willfully or wantonly injuring him. As the evidence does not tend to show a willful or wanton injury, we are constrained to believe the point well taken, unless plaintiff can show an invitation express or implied, to come upon the premises as he did, and the question for us to determine is whether under the facts such invitation can fairly be inferred. If so, defendant is liable, and the judgment of the trial court must be sustained; otherwise not. The test as to whether or not such invitation may be implied is said, by Mr. Campbell in his work on Negligence, to be: "The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is a mere pleasure or benefit of the person using it." It is useless to multiply authorities in support of this rule since the same has been quoted approvingly by this court in *A. T. & S. F. Ry. Co. v. Cogswell*, 99 Pac. 923, and *Faurot v. Oklahoma Wholesale Grocery Company*, 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136.

Applying these principles to the case at bar, it will be seen that defendant was under contract with the government of the United States to transport the mails on this particular train; that it was doing so according to the laws of the United States; that it had a mail car attached to its train, with a mail agent or postal clerk in charge, and handled the same pursuant to rules and regulations imposed by the post office department, of which we will take judicial notice (*Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415); that under instructions from said department it was the duty of said clerk to receive any mail presented to him, if properly prepaid by stamps, on said mail car at stations along its route, when offered by any member of the public (*Pos. Laws & Reg.* [1902] tit. 7, c. 1, § 1145, and tit. 8, c. 3, § 1486; *Rev. St. U. S.* § 3988 [*U. S. Comp. St.* 1901, p. 2714]); that plaintiff, at the time he was making his way to defendant's platform over a recognized way of approach from B street for the purpose of making an offer of mailable matter to said clerk, and thereby transact business with defendant when its train should arrive, tendered to it, in the shape of the stamps on his letter, indirect payment for the service of transportation which he was about to ask it to perform, and which it had no right to refuse. In thus attempting to pass from B street to the platform and on to the mail car when it should arrive plaintiff was neither a trespasser nor licensee, but was there by the implied invitation of defendant to transact business which defendant had undertaken to do for him, for compen-

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sation to be paid by the government. Under the circumstances defendant owed him the duty to exercise reasonable care to provide a reasonably safe passageway from B street to its platform and mail car, and its failure so to do was actionable negligence. 26 Am. & Eng. Enc. of Law, 506, 507, and cases cited.

Hale v. Grand Trunk, etc., Ry. Co., 60 Vt. 605, 15 Atl. 300, 1 L. R. A. 187, was a suit in damages for personal injuries. There was judgment *pro forma* for plaintiff in the county court, and the cause passed to the Supreme Court. That court said: "On November 2, 1885, the defendant was operating a railway from Portland, Me., to Canada Line, and had a station at Berlin Falls, N. H. As such, it was carrying mail on its mail trains for the United States government, according to the laws of the United States, and pursuant to the conditions and regulations imposed by the post office department, at a fixed compensation. The plaintiff on that evening, in attempting to go to its mail train while stopping at the station at Berlin Falls, for the purpose of mailing some letters, in the exercise of due and proper care, fell from an unguarded, and as he claims, insufficiently lighted platform, leading from the station to the train, and was injured. By the regulations of the post office department it was then the duty of postal clerks on trains carrying the mail to receive at the cars, among other things from the public, letters on which the postage had been prepaid, and there to sell stamps with which to prepay such postage. Hence, as a part of the service which the defendant was performing for the government, and for which it was receiving compensation from the government, it was under a duty to furnish the public a reasonably safe passage to and from its mail train, while stopping at its regular stations, for the purpose of purchasing stamps and mailing letters. The plaintiff was a member of the public, and was attempting to pass over the platform provided by the defendant to the mail train for the lawful purpose of mailing two letters. By accepting the carriage of the mail for the government the defendant became under the duty to furnish him a reasonably safe passage to its mail train for the purpose of mailing his letters. In attempting to pass over the platform to its mail train for this purpose the plaintiff was neither a trespasser, intruder, nor loafer, but was there to transact business which the defendant had undertaken to do with him for a compensation received from the government, * * * in fact was there at the invitation of the defendant to transact business which it had been hired to perform for and with him by the government"—and affirmed the judgment of the county court. Plaintiff being thus, rightfully on defendant's premises, its duty to him was clear. This court in A., T. & S. F. Ry. Co. v. Cogswell, *supra*, states the rule thus: "On the other hand, one who goes upon the premises of a railway company to transact business with it or its agents, or to transact business in the operation of the road, or who is there by

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invitation of the company, express or implied, is lawfully there, and the railway company owes him a duty of using ordinary care in the construction and maintenance of its depot and platforms to avoid injuring him. *Bennett v. L. & N. Ry. Co.*, 102 U. S. 577, 26 L. Ed. 235." In *Christie v. Chicago, etc., Ry. Co.*, 61 Minn. 161, 63 N. W. 482, plaintiff went to defendant's depot with a baggage check to get his daughter's trunk, and while there was injured. The court said: "It is the duty of a railroad company to keep the approach to its depot and platform reasonably convenient, accessible, and safe for the ingress, and egress of passengers, and for the public rightfully and properly doing business with it. *Buenemann v. St. Paul, M. & M. R. Co.*, 32 Minn. 390, 20 N. W. 379. In such cases the highest possible degree of diligence and care are not required, but the law imposes upon a railroad company the duty of keeping its approaches reasonably safe for all persons using them for a lawful business purpose; and persons so using such approaches have a right to assume that they are reasonably safe."

It will avail defendant nothing to contend that the invitation thus extended to plaintiff to transact business with it did not invite him to approach its platform and train by way of B street, and over the strip of land on which the frost box was located, for the reason that the evidence discloses that defendant had held out said strip of land to the public for years as a proper approach and recognized way to its said platform, and was under obligation to plaintiff, as a member of the public lawfully on its premises, to use a reasonable degree of care to keep said strip of land in a safe condition for his protection, and for the protection of all persons who might lawfully pass over it on their way to transact business with the defendant. 26 Am. & Eng. Enc. of Law, *supra*, says: "It is the general duty of railroad companies to use a reasonable degree of care to keep in a safe and convenient condition, for the protection of all persons who are lawfully upon the premises for the transaction of business, their station, platforms, and approaches thereto and exits therefrom, and such ways as the railroad company holds out to the public as proper approaches to its station platforms"—citing *Cross v. Lake Shore, etc., Ry. Co.*, 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399; *Louisville, etc., Ry. Co. v. Hirsch*, 69 Miss. 126, 13 South. 244; *Delaware, etc., Ry. Co. v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; *Beard v. Connecticut, etc., Ry. Co.*, 48 Vt. 101. In *Cross v. Lake Shore, etc., Ry. Co.*, *supra*, plaintiff sued for injuries received by a fall into a hole upon the station grounds of the defendant at Pittsford, Mich. The facts disclosed that plaintiff was a passenger on one of defendant's trains, and reached that town in the night. It was dark, raining, and there were no lights about the grounds outside the depot;

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his wife was with him; they left the depot to go to her residence, and to reach the main street of the village they had to go east from the depot; on his way, and while on the grounds of the company, he fell into a hole on a recognized way used by the public going to and from the depot, and sustained permanent injuries. The trial court held the defendant liable, and the judgment was sustained by the Supreme Court, which in passing said: "This diagonal walk being a recognized way to and from the depot, it was the duty of a defendant to keep it reasonably safe. 1 Ror. R. R. 476; Smith, Neg. (2d Ed.) *126, *188; Cooley, Torts, 605; Delaney *v.* Railway Co., 33 Wis. 67; Hulbert *v.* Railroad Co., 40 N. Y. 145; Dillaye *v.* Railroad Co., 56 Barb. (N. Y.) 30; Gaynor *v.* Railway Co., 100 Mass. 208, 97 Am. Dec. 96; Tobin *v.* Railroad Co., 59 Me. 183, '8 Am. Rep. 415; Hoffman *v.* Railroad Co., 75 N. Y. 605; Cartwright *v.* Railway Co., 52 Mich. 606, 18 N. W. 380, 50 Am. Rep. 274"—and in the syllabus said: "It is the duty of a railway company to keep in a reasonably safe condition a recognized way used by the public in going to and from its depot. A hole so near a recognized way, used by the public in going to and from a railroad depot, that a man in the 'ordinary aberrations of travel' might fall into it should be guarded by the company to prevent such an accident."

It having been found, in effect, by the jury under instructions not excepted to, that defendant failed in its duty to plaintiff to use a reasonable degree of care to keep in a reasonable safe condition the recognized way over its grounds from B street to its platform, and there being evidence reasonably tending to support the verdict, and none from which we could say as a matter of law that plaintiff was guilty of contributory negligence, the judgment of the lower court is affirmed. All the Justices concur.

CALDWELL v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, Dec. 9, 1909.)

[105 Pac. Rep. 625.]

Carriers—Invalids—Improper Treatment—Insult—Question for Jury.—Whether a train conductor intended to insult plaintiff, an invalid female passenger, when he told her she should have gone to the other side of the car, where men were employed “to assist such as you,” and at a later occasion when he directed that she be placed in the mail and express car, that, “This is the place for such as you,” was for the jury.

Carriers—Transportation of Passengers—Care Required.*—An instruction that a carrier owed a special duty to a female passenger to protect her from insult was not prejudicial to the carrier, as it owed such duty to every passenger.

Damages—Personal Injuries—Mental Suffering.†—A person is entitled to recover for the actual measurable wrongs suffered, and, in addition thereto, such damages as result from mental suffering.

Carriers—Injury to Passengers—Mental Suffering.†—In order to justify a recovery for mental suffering in an action for injury to a passenger, there must be some facts or circumstances showing a warrant for the mental attitude of the injured party, so that, to warrant recovery of more than nominal damages, wanton or willful disregard of the passenger's rights must be shown.

Damages—Mitigation.—In an action against a carrier for injuries to a passenger by the wrongs of its servant, the servant's conduct, as well as the humiliation suffered by the passenger, should be considered as matter in aggravation, rather than as a basis of a right of action.

Damages—Mitigation.—In an action for injuries to a passenger, the act of the carrier's servant may be shown in mitigation of the alleged wrong, whether the resulting damages are allowed as compensation or by way of punishment.

Damages—Exemplary Damages.—Exemplary damages are not allowable, unless authorized by statute.

Damages—Personal Injuries—Exclusiveness.—Plaintiff, an invalid so crippled that she was unable to walk in an erect position, being usually propelled in a wheeled carriage, went to defendant's station to board a train to attend a picnic. She endeavored to get on the cars from the side away from the platform, and the conductor ob-

*For the authorities in this series on the subject of the liability of a railroad company for insults by employees to passengers, see foot-note of Cincinnati, etc., Ry. Co. v. Strosnider (Ky.), 33 R. R. R. 235, 56 Am. & Eng. R. Cas., N. S., 235.

†For the authorities in this series on the right to recover for mental suffering, see last foot-note of Norris v. Southern Ry. (S. Car.), 33 R. R. R. 208, 56 Am. & Eng. R. Cas., N. S., 208.

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serving her, told her that she should have gotten on from the platform side, where men were employed "to assist such as you." The conductor opened the car door, and allowed her to enter. She refused his assistance, and when the train arrived at her station, the conductor took her in his arms and placed her in her carriage on the platform. On returning, the conductor prepared a room in the end of the combination mail and express car, not then in use except for the storage of brakemen's clothing, and insisted that plaintiff should travel there, seated in her carriage, instead of in the first-class passenger coach, where there was room for her. She protested, and the conductor again said, "This is the place for such as you." Shortly after the train started, she got out of her carriage and rode on the floor, there being no chairs, because she was afraid that the carriage might roll out of the car, though there was no evidence that such was likely. Held that, though plaintiff was entitled as of right to ride in the passenger coach, and was entitled to recover compensatory damages sustained by the conductor's refusal to permit her to do so, a verdict allowing her \$1,000 was so excessive as to indicate passion and prejudice.

Department 1. Appeal from Superior Court, Clarke County; W. W. McCredie, Judge.

Action by Lilly Caldwell against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

A. L. Miller and George T. Reid, for appellant.

Frank E. Vaughan, for respondent.

CHADWICK, J. Plaintiff is an invalid, being so crippled in her lower limbs that she is unable to walk in an erect position. Usually she propels herself in a wheeled carriage, but when necessary can hitch herself along, while sitting down, by pulling her feet forward with her hands. On the 12th day of July, in company with others, she went on a picnic excursion to Knapp's Station, about 8 or 10 miles west of Vancouver, Wash. In the morning of that day she had endeavored to get on the cars on the opposite side from the platform. A friend was present, but was rendering her no actual assistance. Being observed by the conductor, he remonstrated, saying, in effect, that if she had friends, they should assist her, and that she should have gone to the other side of the car, where men were employed to assist passengers when entering the car. Plaintiff says the conductor used these words, "to assist such as you." However, the conductor did unlock the car door opening onto the platform, and allowed her to enter, she refusing his assistance. When the train arrived at Knapp's, the conductor took her in his arms, and possibly with the assistance of another, put her in her carriage on the platform. Plain-

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tiff attaches no great importance to the manner in which she was treated in the morning, admitting that the conductor was polite and kind, but she says she thinks his manner was rather gruff when he first found her on the car steps, and that his remark "such as you" was uncalled for. In the evening, before the train arrived at Knapp's, the conductor prepared a room at the end of the combination mail and express car, which was not then in use, excepting only as the conductor used it as an office, and as the brakeman used it as a place to keep some of their clothing. A door opened from this room, facing the platform and the door of the first-class passenger coach. There were doors also opening on each side, 12 or 14 feet from the end of the car. When the train stopped at Knapp's, plaintiff was about to climb up the steps, when she was hailed by the conductor, who ordered her into the room he had prepared for her. She and her carriage were then lifted together into the express car by two of her friends and a brakeman. She protested vigorously when told that she must ride in the express car, and it is again asserted by her and some of her friends that the conductor again said, this time in the presence of many other people, "This is the place for such as you," and words to that effect. Some of her friends came into the express car and rode with her. After a short time she got out of her carriage and rode on the floor, there being no chairs in the car. The reason she gives for this is that she was afraid her carriage might roll out of the car, although there is no evidence that it was at all likely. It is further asserted that, although the day was very warm, a fire had been built in the stove. This latter fact is denied by the conductor and others. But whether it be so or not, we are not disposed to attach any importance to it as a circumstance showing malice, which was the evident purpose of the testimony. There is nothing to show that the fire was put there by the conductor or any servant of the company. If there was a fire, with three doors open and the train moving, it is not likely that plaintiff suffered any injury therefrom. From a judgment in the sum of \$1,000 in favor of plaintiff, defendant has appealed.

A number of errors are assigned, all but one going to the instructions of the court. It is urged that the court should not have submitted the question of insult to the jury; that the testimony does not warrant the inference that the conductor intended any insult whatever. While it seems improbable that the conductor, by the use of the words "such as you," etc., meant any insult, or intended to refer in any intemperate way to respondent's infirmity, the effect of his language would depend upon his manner and the manner of his speech. It was clearly a question for the jury. It is to be regretted that a conversation or words from which a jury is called upon to draw a legal conclusion must be re-

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peated by those whose interest may unconsciously drive them to give a tone or color never intended by the first speaker, and which may result even in injustice to him. But there is no better way, nor is it likely that one will ever be devised. Consequently, when dealing with this class of testimony, courts must take the verdict for the fact.

It is also complained that the court told the jury that a carrier owed an especial duty to a female passenger to protect her from insult. Without committing ourselves to the doctrine that a carrier owes a higher duty to a female passenger than to a male passenger in this respect, we think that the instruction was not prejudicial, for it cannot be denied that a carrier owes such a duty to every passenger.

The final assignment is that the verdict is so excessive as to show prejudice or passion on the part of the jury. A party is entitled to recover for the actual, measurable wrongs sustained, and in addition thereto such damages as result from injury to the feelings, or, as it has been put, compensation for mental suffering. But there must be some ground upon which to base this element. Damages do not flow from the mere declaration of the party that he has suffered in feeling. There must be some facts or circumstances showing some warrant for the mental attitude of the party who alleges the wrong, so that, in order to warrant a recovery on this account for more than nominal damages, the wrong must be attended by circumstances showing a wanton or willful disregard of the rights of the passenger. In other words, in an action against a company for the wrong of its servant, the conduct of the servant, as well as the humiliation suffered by the passenger, are facts to be considered, in the light of all attending facts and circumstances, as matter in aggravation rather than the basis of the right itself. "The motive of the wrongdoer is a material consideration, although affecting the question of compensatory damages simply. The reason for this is that, if the wrong is committed willfully, wantonly, or maliciously, it is likely to be more trying or aggravating in its mental effects than if such elements be lacking." 8 Am. & Eng. Enc. Law, 661. On the other hand, the act of the servant may be shown in mitigation of the alleged wrong, whether the resultant damages be allowed as compensation or by way of punishment and example. Hence, where exemplary damages are allowed, the rule is stated thus: "* * * If the servant in performing the act in question was in good faith attempting to do what he believed to be his duty, though mistakenly, exemplary damages will not be allowed, though full compensation will be given." Hutchinson, Carriers, 1443. If this is the rule where exemplary damages are allowed, it must apply with added force where, as in this state, exemplary damages are not allowed in any case unless under some statute. It does

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not follow from the duty to award compensation that a jury can assess damages which, upon the fact of the verdict, considering the whole record, show an evident purpose to punish. There is absolutely nothing in the record to warrant the assumption that the conductor acted in a wanton manner, or with willful intent to heap any indignity upon respondent. Indeed, in the cold light of the record, stripped of the drama of the trial, the wonder is that the jury returned a verdict for more than nominal damages. One of respondent's own witnesses, a lady who was with her in the car, could extract no greater degree of wrong or humiliation out of the case than embarrassment, an opinion in all probability emphasized by respondent's affliction. A fair reading of the record indicates no more than an honest attempt, possibly clumsily executed, to minister to the comfort of an afflicted person, and this met by a protest gendered of a supersensitive nature. But respondent was received as a passenger. The jury found that there were vacant seats in the passenger coach in which she was entitled to ride. She is therefore entitled to compensation for her actual injuries. We confess our inability to fix this amount on any rational basis, and, the verdict being unaccountable on any other theory than that the jury was influenced by passion and prejudice, or a spirit of vindictiveness, aggravated by the helpless condition of the respondent, we have decided to follow the practice adopted in the case of *Olson v. Northern Pacific Railway Company*, 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209, and remand the case for a new trial, without foreclosing the right of appellant to assert all defenses heretofore urged by it.

RUDKIN, C. J., and FULLERTON, MORRIS, and GOSE, JJ., concur.

ILLINOIS CENT. R. CO. *v.* DUNNIGAN.

(Supreme Court of Mississippi, Oct. 18, 1909.)

[50 So. Rep. 443.]

Carriers—Carriage of Passengers—Fares—Ministers of the Gospel.

—Permitting a minister of the gospel, or any person, to travel at a rate lower than that given to the general public, by a carrier, is a mere gratuity, which the carrier can withhold at its pleasure, and even a custom to allow a lower rate imposes upon it no obligation to give such permission.

Appeal from Circuit Court, Panola County; W. A. Roane, Judge.

Action by Sam Dunnigan against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Mayes & Longstreet, for appellant.

Shands & Montgomery, for appellee.

SMITH, J. It being the custom of appellant to give ministers of the gospel a permit to travel over its lines at the reduced rate of two cents per mile, appellee, being a minister of the gospel of the Colored Methodist Episcopal Church of America, applied to appellant for such a permit, which appellant refused to give him, assigning no reason therefor. Thereupon this suit was instituted by appellee to recover damages for such refusal; the declaration alleging that the same was a willful, wanton, oppressive, and unlawful discrimination against him. From a judgment awarding damages to appellee, this appeal is taken.

The declaration is challenged on the ground that it shows no cause of action. The only duty which appellant owed to appellee was to furnish him with transportation over its lines at the same rate and under the same conditions that it furnished same to the general public. Permitting a minister of the gospel, or any person, to travel at a rate lower than that given the general public is a mere gratuity, which appellant can withhold at its pleasure, and even a custom so to do imposed upon it no obligation to give such permission.

The declaration, therefore, states no cause of action, and the judgment of the court below is reversed, and the cause dismissed.

ST. LOUIS, I. M. & S. RY. CO. *v.* DALLAS.

(Supreme Court of Arkansas, Jan. 3, 1910.)

[124 S. W. Rep. 247.]

Carriers—Ejection of Intoxicated Passenger—Liability.*—If the trainmen knew a passenger was so intoxicated as to be unable to avoid dangers from passing trains, when ejected, and the place where he was ejected was dangerous to one in his condition, the carrier was liable if injury resulted.

Carriers—Ejection of Passenger—Contributory Negligence.†—If a passenger was not so intoxicated that he was unable to understand the dangers to which he was exposed at the place he was ejected, he could not recover for injuries occurring after he was put off, caused by his failure to exercise due care for his safety.

Carriers—Ejection of Passenger—Injuries—Sufficiency of Evidence.—In an action for injuries to a passenger by being run over by another train after he was ejected from defendant's train, evidence held sufficient to support a verdict for plaintiff.

Evidence—Admissions against Interest—Admissibility.—Statements made by a party against his interest are competent as original testimony, so that in a personal injury action a written statement signed by plaintiff and claimed to have been made by him prior to the action, giving the circumstances of his injury, was admissible, though plaintiff, while admitting his signature, denied having the things contained therein.

Appeal and Error—Objections—Instructions—Misleading Instructions.—Instructions, which, though somewhat ambiguous and misleading, could have been cured by a specific objection thereto, which was not made, would not be ground for reversal.

Damages—Necessity of Proof of Damages—Pain and Suffering.—The jury must be governed by the evidence in awarding damages for pain and suffering.

Appeal from Circuit Court, Hot Springs County; W. H. Evans, Judge.

Action by Fred Dallas against the St. Louis, Iron Mountain &

*See last foot-note of *Mobile, etc., R. Co. v. Jackson* (Miss.), 30 R. R. 120, 53 Am. & Eng. R. Cas., N. S., 120; foot-note of *Chesapeake & O. Co. v. Crank* (Ky.), 29 R. R. R. 657, 52 Am. & Eng. R. Cas., N. S., 657; *Stringfield v. Louisville Ry. Co.* (Ky.), 29 R. R. R. 648, 52 Am. & Eng. R. Cas., N. S., 648; second head-note of *Louisville & E. R. Co. v. McNally* (Ky.), 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642.

†See first foot-note of *Mobile, etc., R. Co. v. Jackson* (Miss.), 30 R. R. 120, 53 Am. & Eng. R. Cas., N. S., 120; last foot-note of *Kansas City, etc., R. Co. v. Davis* (Ark.), 29 R. R. R. 664, 52 Am. & Eng. R. Cas., N. S., 664; first head-note of *Keeshan v. Elgin, etc., Traction Co.* (Ill.), 28 R. R. R. 562, 51 Am. & Eng. R. Cas., N. S., 562.

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Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Fred Dallas brought suit against the St. Louis, Iron Mountain & Southern Railway Company, for injuries alleged to have been received by him in being wrongfully ejected from one of its passenger trains, and in being left in an unconscious condition near the tracks of its line of railway, whereby his leg was cut off by another of defendant's trains which passed shortly afterwards. Fred Dallas, the plaintiff testified, substantially as follows: On September 29, 1907, about 2 o'clock p. m., he took defendant passenger No. 806 at El Dorado for Camden, Ark. When the train reached Camden, he concluded to go to Malvern, Ark., and paid his passage to that place. The train auditor, upon receipt of his fare, put the usual check in his hat. When plaintiff boarded the train, he was sober; but he began drinking whiskey on the way, and he became drunk. When the train stopped at Walco, a station about two miles south of Malvern, he started out to look around. When he reached the steps, some one (he thinks was one of the train crew) pushed him from the steps of the coach. He says he fell backward and did not remember anything more until the next morning. When he recovered consciousness, he found that his leg had been cut off, but says that he does not remember any of the attending circumstances. Other passengers on train No. 806, on the day in question, testify that they saw one of the train crew shove the plaintiff from the steps of the coach. One witness said that, when the plaintiff fell, the brakeman kicked him out of the way. Other witnesses testified that they saw him lying within eight or ten feet of the track, and that he was unconscious. Others say that he was unconscious, but was some distance farther away. The train crew were witnesses for the defendant, and deny that the plaintiff was kicked or shoved off of the steps of the train, and that they knew he was drunk, or was left lying near the track in an unconscious condition. The train stopped at Walco about 8 o'clock p. m., which at that season of the year was shortly after dark. The train proceeded to Malvern, about 2 miles distant, and, while there, defendant's passenger train No. 223, south bound, passed it. When it arrived at Walco, two or three passengers got off, and the train started up. Just then, other passengers came out of the coach, and the train was again stopped to discharge them. It had moved up about 30 feet. When it made the second stop, a cry of distress was heard from the rear of the train. An investigation was made, and plaintiff was found under the rear trucks under the rear coach, with the wheels resting on his legs. He was released as quickly as possible, placed on a cot, and carried to Malvern, where his leg was amputated. Walco is a station 2 miles south of Malvern established for the benefit of a lumber mill and its employees. There was a trial by jury, and a verdict for the plaintiff. The defendant has appealed from the judgment rendered upon the verdict.

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Kinsworthy & Rhoton, Bridges, Wooldridge & Gant, and Jas. H. Stevenson, for appellant.*H. B. Means and J. C. Ross*, for appellee.

HART, J. (after stating the facts as above). 1. It is earnestly insisted by counsel for defendant that there is not sufficient evidence to support the verdict. The duty of the carrier to a drunk passenger and its liability for the neglect of it is stated by Mr. Hutchinson as follows: "And, this rule is true whether the attendant danger arises from the natural infirmity of the person or was self-imposed. Thus, if a person on a train is so intoxicated as to render him unconscious of danger and unable to appreciate his position, surrounding and perils and his duty to avoid them, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of recklessness and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected, in a proper manner and at a proper place." 2 Hutch. Carr. § 1083, p. 1260. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place and under conditions and circumstances which would expose him unnecessarily to great peril of life or bodily harm, and this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person, and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor under such circumstances that constitutes the act culpable or willful wrong.

If the deceased was intoxicated to the degree that he was unconscious of danger, could not grasp his position and surroundings, and his duty to avoid danger from passing trains, or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages, resulting from such misconduct. Where intoxication, which did not take away consciousness, and the power to consider and understand the danger to which he was exposed, or deprive him of physical capacity to take care of himself, and to avoid danger, would not relieve him of the responsibility of exercising due care, after he was put off the train, and, if he was killed in consequence of such negligence of duty on his part, the plaintiff cannot recover. The killing under the circumstances would be the result of his

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own negligence, which proximately contributed to it. *Johnson v. Louisville R. R. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39.

In the case of *Black v. New York, New Haven & Hartford Railway Company*, 193 Mass. 448, 79 N. E. 797, 7 L. R. A. (N. S.) 148, the court held: "Where the plaintiff's negligence or wrongdoing had placed his person or property in a dangerous situation which is beyond his immediate control, and the defendant, having full knowledge of the dangerous situation, and full opportunity, by the exercise of reasonable care, to avoid any injury, nevertheless causes an injury, he is liable for the injury, as the plaintiff's former negligence is only remotely connected with the accident, while the defendant's conduct is the sole, direct, and proximate cause of it."

The reason of the rule is that the law subordinates personal rights to the preservation of life. The rule is firmly established, but the application of it sometimes gives rise to difficult questions. In the case at bar, the defendant's theory of the case was that plaintiff was injured while trying to board its south-bound train when in motion; but the jury might have found that the plaintiff was shoved from one of defendant's passenger trains by its employees, and was left lying close to the track in an unconscious condition, that with knowledge of his helpless condition, and of the further fact that it was dark, and that there was no one there to render him assistance, they left him near the track exposed to the dangers of a train which would necessarily pass in a short time, and that as a result thereof the plaintiff was injured. Hence we conclude that there was sufficient evidence to support the verdict of the jury.

2. The claim agent of the defendant testified that on the 21st day of October, 1907, the plaintiff gave a statement of the facts and circumstances of his injury; that said statement was in writing and signed by the plaintiff. Plaintiff admitted his signature to the statement, but denied having said of the matters contained in it. Defendant offered to introduce the statement in evidence and assigns as error the action of the court in excluding it. The court should have admitted the statement in evidence. The rule in *St. Louis, Iron Mountain & Southern Ry. Co. v. Faisst*, 68 Ark. 592, 61 S. W. 374, invoked by counsel for plaintiff, is not applicable, for plaintiff sustained two relations to this suit; he was both plaintiff and witness. As said in the case of *Collins v. Mack*, 31 Ark., at page 694: "The acts and declarations of a party to a suit, when they afford any presumption against him, may be proven by the opposing party." It is a well-recognized rule of evidence that any statements which may have been made to a party to a suit against his interest, touching material facts, are competent as original testimony. *Black v. Epstein*, 221 Mo. 286, 120 S. W. 755; *Louisville & N. R. Co. et al. v. Onan's Adm'r*, 110 S. W. 382, 33 Ky. Law Rep. 462.

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3. Counsel for defendant also insist that the court erred in giving instruction No. 7 at the instance of the plaintiff. The instruction is to some extent ambiguous and misleading, in this, that it might be inferred from it that the jury should render a verdict for any amount they deemed right for the pain and suffering regardless of the evidence. But the defect could have been cured by a specific objection. For that reason we would not reverse the case for this alleged error; but, inasmuch as the case must be reversed for the error already indicated, we deem it proper to caution the court in regard to the form of the instruction. While, as we have said, it is difficult to fix a measure of damages for pain and suffering for the reason that none would be an acceptable inducement to suffer it, yet, in determining the amount of compensation for it, the jury must be governed by the evidence in the case. See *Aluminum Company of North America v. Ramsey*, 89 Ark. 522, 117 S. W. 568; *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624; *Railway Co. v. Dobbins*, 60 Ark. 485, 30 S. W. 887, 31 S. W. 147; *St. L., I. M. & So. Ry. Co. v. Cantrell*, 37 Ark. 522, 40 Am. Rep. 105; *Barlow v. Lowder*, 35 Ark. 496.

For the error in excluding the written statement of plaintiff from the jury, the judgment will be reversed, and the cause remanded for a new trial.

CRAWFORD v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, Nov. 18, 1909.)

[122 S. W. Rep. 220.]

Carriers—Injury to Passengers—Negligence.*—A carrier operating its train at the ordinary rate of speed is not liable to a passenger thrown from the back platform, on which he was riding, while the train was on a curve, on the ground that the train was operated at a dangerous rate of speed.

Appeal from Circuit Court, Clark County.

"Not to be officially reported."

Action by W. Anderson Crawford against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. M. Beckner, for appellant.

Fred P. Caldwell, Benjamin D. Warfield, Pendleton, Bush & Bush, and John T. Shelby, for appellee.

*For the authorities in this series on the question whether the speed of a train or car may be negligent with respect to a passenger riding upon it, see *Partelow v. Newton*, etc., Ry. Co. (Mass.), 24 R. R. R. 605, 47 Am. & Eng. R. Cas., N. S., 605.

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BARKER, J. The appellant, W. Anderson Crawford, boarded the train of the appellee railroad company at Winchester, Ky., for the purpose of being transported to his home at Elkins, Ky. The car was somewhat crowded, and he took a seat upon the back platform of the rear car, intending to prevent himself from falling by holding on to the iron handrails. The conductor came around, found him on the back platform, and collected his fare without saying anything to him. When the train reached Elkins, which was the station of appellant, he did not observe that it was the place to get off the car, and claims that he did not hear any announcement made of the station. As a result, he was carried beyond Elkins, and he then made up his mind to leave the train at Ford and go home from there. Just before he reached Ford, the train encountered a curve which was in a cut. When the car upon which appellant was sitting struck this curve he was thrown from the platform, striking his head against the side of the cut, receiving severe injuries, to recover damages for which he instituted this action. The basis of appellant's claim for recovery, as set forth in his petition, is that the train was operated at a high and dangerous rate of speed, which caused it to lurch so severely when it struck the curve above mentioned that he was thrown off the platform and injured. The defendant answered controverting all the material allegations of the petition, and pleading, in addition thereto, the contributory negligence of the plaintiff. When the issues were made up a trial was had before a jury, and at the close of plaintiff's testimony the circuit judge sustained a motion made by defendant corporation for a peremptory instruction to the jury to find for it. Of this instruction the plaintiff (appellant) complains.

The court ruled correctly in sustaining the motion for a peremptory instruction. There is not the slightest evidence in the case that the train was being operated at a high or dangerous rate of speed, or that it was being operated in any other way than on schedule time. Appellant's own evidence on this subject is to the effect that he did not know whether the train was running faster than usual or not. His testimony on this subject was as follows: "The train seemed to be running fast, and mighty fast when I was thrown off, as I have told. It was downgrade, and seemed to be running very fast; but I do not know whether it was unusually fast or not. I do not know that it was running faster than usual. I was holding tight to the rail when I was thrown off." No witness said the train was running faster than the ordinary schedule time. The allegation of the pleading that the train was operated at a high and dangerous rate of speed was not sustained by the evidence; and, this being the only negligence alleged or attempted to be shown, it seems to us that there was nothing for the court to do but award a peremptory instruction at the close of plaintiff's testimony. He knew when he took

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a seat on the platform that there is always danger attending such a position. All railroads have curves, and, as a rule, the trains are operated quite fast. To operate the trains so as to travel rapidly is one of the great utilities of the railroad system, and plaintiff was bound to know, if he sat outside of the car on the platform, that when the fast-moving car struck a curve he was liable to be thrown off. We do not see wherein the company was negligent.

Judgment affirmed.

BATES v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Wisconsin, Oct. 5, 1909.)

[122 N. W. Rep. 745.]

Carriers—Carriage of Passengers—Condition of Premises—"Question of Engineering."*—The rule that, as long as there is no latent danger in the construction or maintenance of appliances, a servant assumes the risk of injury from the obvious character of such appliances, has no application between carrier and passenger; and hence, in an action against a railroad by a passenger for injuries in a baggage room, that the construction of the baggage room was a "question of engineering," meaning a question of judgment in the construction of the appliance, was not a defense; it being the duty of defendant to have the room reasonably safe.

Carriers—Depot Buildings—Duty of Carrier.*—It is the duty of a carrier to provide reasonably safe buildings in which property transported over its road may be securely stored, and facts showing the character and location of the building, materials out of which it was built, and its liability to take fire are proper to go to the jury to show that the building was not reasonably safe.

Carriers—Railroads—Lighting Depots—Questions for Jury.†—While it is the duty of a railroad to have its depot open and lighted.

*For the authorities in this series on the subject of the liabilities of railroad companies, as carriers of passengers, for injuries resulting from defects in stations or depot premises, see foot-note of Missouri, etc., Ry. Co. v. Criswell (Tex.), 29 R. R. R. 673, 52 Am. & Eng. R. Cas., N. S., 673; Merryman v. Chicago Great Western Ry. Co. (Iowa), 27 R. R. R. 94, 50 Am. & Eng. R. Cas., N. S., 94.

†For the authorities in this series on the subject of the duty to keep stations and depots open for the accommodation of passengers, see Draper v. Louisville, etc., R. Co. (Ind.), 18 R. R. R. 255, 41 Am. & Eng. R. Cas., N. S., 255; Chicago, & A. R. Co. v. Walker (Ill.), 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596.

For the authorities in this series on the subject of the duty of a railroad to light its depots and station premises, see last foot-note of Wagner v. Atlantic C. L. R. Co. (N. Car.), 28 R. R. R. 735, 51 Am. & Eng. R. Cas., N. S., 735; seventh and eighth head-notes of Pere Marquette R. Co. v. Strange (Ind.), 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66.

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for the convenience of passengers, it is for the jury whether in any particular case the road was negligent in failing to have such lights.

Carriers—Carriage of Passengers—Personal Injuries—Unsafe Baggage Room—Questions for Jury.—In an action against a railroad for injuries to a passenger through stepping into space between a baggage truck and the wall of a depression in the floor of the room, made to bring the top of the truck on a level with the floor, to facilitate the loading and unloading of baggage, whether the room, as so constructed, was reasonably safe for the use of passengers identifying baggage therein, held, under the evidence, for the jury.

Trial—Submission of Questions.—In an action against a railroad for injuries to a passenger in an alleged unsafe baggage room, the court properly refused to submit to the jury, as part of the special verdict, whether it could have been reasonably anticipated that the accident would have occurred at the time and place in question, since the inquiry should have been whether defendant could have reasonably anticipated that an injury might probably result to a passenger by reason of the construction and maintenance of the room used as it was.

Trial—Disregarding Testimony of Witnesses.—It requires an extraordinary case to authorize the court to regard sworn testimony as manifestly impossible and untrue.

Trial—Province of Court and Jury—Weight and Credibility of Testimony.—The weight and credibility of testimony are for the jury.

Carriers—Carriage of Passengers—Personal Injuries—Contributory Negligence—Burden of Proof.—In an action against a railroad for injuries to a passenger in an alleged dangerous baggage room, the burden of proving that plaintiff must have seen and ought to have avoided the danger was on defendant.

Trial—Special Findings.—Under Laws 1907, p. 571, c. 36 (St. 1898, § 2858m), providing that whenever any special verdict is submitted to a jury, and there is omitted therefrom some controverted matter of fact not brought to the attention of the trial court by request, but essential to sustain the judgment, such matter of fact shall be deemed determined by the court, in conformity with its judgment, and the neglect or omission to request a finding by the jury on such matter shall be deemed a waiver of jury trial pro tanto, and a consent that such omitted fact be determined by the court, it is incumbent on attorneys to present to the trial court fairly and openly requests for the submission of questions of fact in a special verdict, and if, being present and having opportunity, they fail to do so, they thereby waive the right to have the jury pass on that particular item of fact, and the court, upon rendering judgment adversely to them, necessarily resolves that fact against them.

‡For the authorities in this series on the subject of the burden of proving contributory negligence, see second foot-note of *Grimm v. Milwaukee Elec. R. & L. Co.* (Wis.), 33 R. R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665.

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Appeal from Circuit Court, Vernon County; J. J. Fruit, Judge.

Action by Mary A. Bates against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Among other references upon the part of the appellant were the following: *Twitchell v. G. T. Ry. Co.* (D. C.) 39 Fed. 419; *Bandekow v. C., B. & Q. Ry. Co.*, 136 Wis. 341, 117 N. W. 812; *Groth v. Thomann*, 110 Wis. 488, 86 N. W. 178; *Hill et al. v. Fond du Lac*, 56 Wis. 242, 14 N. W. 25; *Kelley v. C., M. & St. P. Ry. Co.*, 53 Wis. 74, 9 N. W. 819; *Sherman v. Menominee R. L. Co.*, 77 Wis. 14, 45 N. W. 1079; *McGowan v. C. & N. W. Ry. Co.*, 91 Wis. 147, 64 N. W. 891; *Block v. Milwaukee St. Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *Rowley v. C., M. & St. P. Ry. Co.*, 135 Wis. 208, 115 N. W. 865; *Jones v. C. & N. W. Ry. Co.*, 49 Wis. 352, 5 N. W. 854; *Bourda v. Jones*, 110 Wis. 52, 85 N. W. 671; *Peat v. C., M. & St. P. Ry. Co.*, 128 Wis. 86, 107 N. W. 355; *O'Brien v. C., M. & St. P. Ry. Co.*, 102 Wis. 628, 78 N. W. 1084; *Dowd v. C., M. & St. P. Ry. Co.*, 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917; *Boyce v. Wilbur L. Co.*, 119 Wis. 642, 97 N. W. 563; 6 *Thompson, Neg.* § 7635; *Atkinson v. Goodrich T. Co.*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352.

Among other references upon the part of the respondent were the following: *Ill. Cent. R. R. Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413; *Hupfer v. Nat. Dist. Co.*, 114 Wis. 279, 90 N. W. 191; *Bennett v. Louisville, etc., Ry. Co.*, 102 U. S. 577, 26 L. Ed. 235; *Barowski v. Schulz*, 112 Wis. 415, 88 N. W. 236; 3 *Thompson, Neg.* §§ 2678, 2709, 2710; *Bremer v. Pleiss*, 121 Wis. 61, 98 N. W. 945; 1 *Thomp. Neg.* § 993; *Banderob v. Wis. Cent. Ry. Co.*, 133 Wis. 249, 113 N. W. 738; 26 *A. & E. Ency. Law*, p. 512; *Hartwig v. C. & N. W. Ry. Co.*, 49 Wis. 358, 5 N. W. 865; *Bloor v. Delafield*, 69 Wis. 273, 34 N. W. 115; *Garske v. Ridgeville*, 123 Wis. 503, 102 N. W. 22; *Morey v. Lake Superior, etc., Co.*, 125 Wis. 148, 103 N. W. 271, 12 L. R. A. (N. S.) 221; *Howard v. Beldenville L. Co.*, 129 Wis. 98, 108 N. W. 48.

C. E. Vroman and *C. W. Graves*, for appellant.

D. O. Mahoney and *J. Henry Bennett*, for respondent.

TIMLIN, J. Upon a special verdict finding that the plaintiff when injured was in the baggage room of the defendant at the invitation of the baggage master, and that this baggage room was not then reasonably safe for the use of passengers invited thereto to identify their baggage, and that this condition of the baggage room was the proximate cause of plaintiff's injury, and that there was no want of ordinary care on plaintiff's part which contributed to such injury, the plaintiff had judgment for the amount of damages found by the jury.

The appellant assigns several errors, which fairly raise the

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question of the sufficiency of the evidence to support the verdict, of the sufficiency of the verdict to support the judgment, and complains of failure to submit to the jury a question proposed by defendant, also of error in instructions to the jury. The facts in evidence show that the baggage room of the respondent at La Crosse is so constructed that a depression or pit extends from the double doors at the west side of the room eastward into the room about 24 feet and nearly across the room. This is about 2 feet 9 inches in depth, and slightly wider than the baggage truck, and it is used for running the baggage truck into the room so that the platform of the truck will be practically on a level with the floor of the room. This is an obvious convenience in loading baggage on the truck and transferring the loaded truck from the baggage room to the platform which is on the lower level. At both sides and at the end of this pit or depression the floor of the baggage room is available for and used for the deposit of baggage. The plaintiff was a passenger on defendant's road, and went into the baggage room at the suggestion of the defendant's employees to identify her baggage and have the same checked. She then had some conversation with the baggageman, and left for the purpose of purchasing a rope to tie up one item of her baggage which was defectively fastened. She then returned, and engaged in conversation with the baggage master, while one of the assistants of the latter was tying up the baggage with this rope which she brought with her. She went with the baggage master across the baggage room to identify her luggage. Near where she stood there was a truck in the pit or depression, and she accidentally stepped between the edge of the truck and the edge of the pit or depression, breaking her leg and sustaining injuries. She had not noticed, nor had her attention been called to, the pit, depression or truck up to this time. The testimony on the part of the defendant differed materially from this, but the foregoing is the version of the occurrence established by the verdict.

Upon this state of facts the defendant denies the right of the plaintiff to recover damages because the construction of the baggage room was "an engineering problem," and contends that its construction and maintenance was no breach of duty to any one; that it was a customary and usual mode of constructing baggage rooms and handling baggage and necessary to the easy and convenient operation of that branch of the carrying business; and that, therefore, the jury was not warranted in finding that the baggage room was not reasonably safe. To maintain this contention the appellant cites *Boyd v. Harris*, 176 Pa. 484, 35 Atl. 222; *Tuttle v. Detroit, etc., Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *C. & G. W. Ry. Co. v. Armstrong*, 62 Ill. App. 228; *St. Louis Nat., etc., Co. v. Burns*, 97 Ill. App. 175; *C. & E. I. Ry. Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Titus v. Bradford*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Bethlehem I. Co. v.*

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Weiss, 100 Fed. 45, 40 C. C. A. 270, and other cases of that class. These cases all involved questions arising between master and servant. Generally speaking, and without reference to special statutes or exceptional rules, the law confers upon the master the right to construct and maintain his own property and appliances in his own way and according to his own judgment, and, so long as there is no latent or hidden danger in such construction or maintenance, the servant accepting employment from the master does so subject to this right of the master, and assumes the risk of injury from the open and obvious character of such appliances. Consequently in such cases, where the defect causing the injury presents a mere question of this kind, courts have sometimes designated it as a mere "question of engineering," meaning a question of judgment in the construction of the appliance. There is no legal rule or doctrine by force of which a court or jury is disabled from deciding a cause merely because in such decision there may be involved "a question of engineering." The expression relates to a condition of fact pertinent in cases between master and servant, and not to rule by law. The rule above stated obtaining between master and servant and relied upon by appellant has no application between carrier and passenger, which was the relation of the parties in the instant case. As to the respondent, it was the duty of appellant to have its baggage room reasonably safe. *Indemaur v. Dames*, 19 Eng. Rul. Cas. 64; *Ill. Cent. R. R. Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413; *Banderob v. Wis. Cent. Ry. Co.*, 133 Wis. 249, 113 N. W. 738. Whether or not the appellant performed this duty may be a question of law or a question of fact, and the inquiry in the instant case is whether there was sufficient evidence to go to the jury on this point. It is the duty of a carrier to provide reasonably safe depot buildings in which freight and property transported over its road might be securely stored; and facts showing the character and location of the depot buildings, the materials out of which it was built, and its liability to take fire are proper to be laid before the jury for the purpose of showing that the building was not reasonably safe. *Whitney v. C. & N. W. Ry. Co.*, 27 Wis. 327. See, also, *Conroy v. Railway Co.*, 96 Wis. 243, 250, 70 N. W. 486, 38 L. R. A. 419. While it is the duty of the railroad company to have its depot open and lighted for the convenience of passengers (*Dowd v. Railroad Co.*, 84 Wis. 105, 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917), it is a question for the jury whether under the circumstances of the particular case the railroad company was negligent in failing to have such lights. *Patten v. C. & N. W. R. R. Co.*, 32 Wis. 524. Whether a railroad company provided a sufficient platform to enable passengers to descend from the cars without danger was said to be a question for the jury in *Delamatyr v. M. & P. du C. R. R. Co.*, 24 Wis. 578; and a like ruling was made in *McDermott v. Railway Co.*, 82 Wis. 246, 52 N. W. 85, where several

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cases are cited; and see *Banderob v. Railway Co.*, 133 Wis. 249, 113 N. W. 738. Whether the baggage room constructed as described was reasonably safe for the use of passengers claiming or identifying baggage therein was in the case at bar, we think, a question for the jury, notwithstanding the particular defect which rendered it unsafe inhered in a plan of the room deliberately adopted and used at La Crosse and elsewhere by the appellant. Not that the jury may at its will condemn any plan or building as not reasonably safe, but facts and circumstances may be laid before them tending to show that the building is dangerous for the use to which it is put by the carrier, and it is for the court to say whether the evidence has any such tendency, and for the jury to pass upon its weight and sufficiency. No doubt, if the baggage room so constructed was only for the purpose of transferring baggage to and from outgoing and incoming trains with the truck described, there would be no evidence of its insufficiency for that purpose, but, when it is also used as a place for passengers to enter and walk about in for the purpose of identifying baggage at all hours and under all conceivable conditions of congestion of baggage, it may well be found to have been so constructed as to be dangerous to those passengers so using it. The finding of the jury covers both construction and maintenance, and the maintenance of this unguarded opening in a baggage room used for such purposes might well, upon the evidence before the jury, be found to constitute a failure to maintain the baggage room in a reasonably safe condition. It is not necessary to this to say that a barrier or railing around the pit or opening would destroy or impair its efficiency for the purpose of loading or unloading and removing baggage. For such purposes the baggage room was reasonably safe. It is only when the additional use by passengers for the purpose of identification is added that the room can be said not to have been reasonably safe for such additional use. Criticism upon the instructions to the jury because such instructions permit the jury to consider whether or not the appellant was negligent in constructing and maintaining the pit in question are disposed of by these considerations.

The appellant requested the court to submit to the jury the following question as part of the special verdict: "Could it have been reasonably anticipated that the accident in question would have occurred at the time and place in question?" The court properly refused to submit this question. Its negation would have determined nothing. The mere fact that the appellant could not have reasonably anticipated the specific accident at the particular time and place is not significant. The inquiry should have been whether the appellant could have reasonably anticipated that an injury might probably result to a passenger by reason of the construction and maintenance of this baggage room used as it was. *Coolidge v. Hallauer*, 126 Wis. 244, 105 N. W. 568. It is

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not necessary to decide whether this refusal would have been error if the question was properly drawn.

On the question of contributory negligence, it is contended that the respondent must have seen and ought therefore to have avoided this pit or depression, and that her testimony to the effect that she did not see it is manifestly impossible and untrue. It requires an extraordinary case to authorize the court to so dispose of sworn testimony. Whether the respondent saw the pit or not would depend on the amount and location of the baggage in the room, whether there was or was not a truck in the pit, how she reached her baggage, what were her habits and opportunities of observation in many particulars, and we cannot say that her testimony on this point is impossible. Its weight and credibility were for the jury. The burden of proof upon this point was upon the appellant.

The jury found by special verdict that the baggage room was not reasonably safe for the use of passengers who were invited therein for the purpose of identifying and having baggage checked, and that this was the proximate cause of respondent's injury, and that there was no contributory negligence on the part of the respondent, but did not expressly find defendant negligent or find defendant negligent further than may be implied from the above findings. The appellant did not request that this question of defendant's negligence be submitted to the jury. It is not necessary in this case for the court to determine whether or not an express finding of negligence was necessary in addition to the facts above found in order to fix the liability of the appellant, because, if such finding was necessary to uphold a recovery, it must be presumed that the appellant by its failure to request its submission to the jury waived appellant's right to the determination of that question by the jury, and also that that question was determined adversely to the appellant by the judgment appealed from, because, as we have seen, there is evidence to support such a finding. Chapter 346, p. 571, Laws 1907, being section 2858m, St. 1898, changes the rule which formerly prevailed, and it is now incumbent upon attorneys to present to the trial court fairly and openly requests for the submission of questions of fact in a special verdict. If by inadvertence or finesse they fail to do so, being present and having opportunity, they thereby waive the right to have the jury pass upon that particular item of fact, and the court rendering its judgment adversely to them (if the court does so render judgment) necessarily resolves that fact against them.

Respondent's counsel cites chapter 192, p. 205, Laws 1909, to us for the purpose of showing that the judgment in his favor should not be reversed or set aside except as therein provided. The statute is as follows: "No judgment shall be reversed, set aside, or new trial granted in any action or proceeding, civil or

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criminal, on the ground of misdirection of the jury or the improper admission of evidence or for error as to any matter of pleading or procedure unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment or to secure the new trial." It is not quite clear what change this act makes in the rules adopted and acted upon by this court long prior to the passage of the act. See *Franke v. Mann*, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856, and *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816. The cases applying and announcing those rules are too numerous to be cited. Eighty instances of this kind will be found cited and referred to under the title "Appeals and Errors," subtitle 11 "Harmless and Immaterial Errors," Cumulative Index Digest for September, 1908, which merely covers the work of this court from 122 Wis. to 115 N. W. Rep., inclusive. Whether this act of 1909 changes the rule stated in *Dresser v. Lemma*, 122 Wis. 387, 100 N. W. 844, to the effect that, if error is committed, prejudice is presumed to flow therefrom, and whether that rule so stated is consistent with *Franke v. Mann*, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856, which declares that not only error but prejudicial error must be made to appear affirmatively, or consistent with other decisions of this court, and how far, if at all, the act of 1909 extends the existing provisions of section 2829, St. 1898, has not been discussed by counsel, and we reserve the decision of these questions for some case in which they are necessarily involved and thoroughly presented.

The judgment of the circuit court is affirmed.

WINSLOW, C. J., took no part.

LEXINGTON RY. CO. *v.* JOHNSON.

(Court of Appeals of Kentucky, Dec. 2, 1909.)

[122 S. W. Rep. 830.]

Carriers—Negligence—Gross Negligence—Punitive Damages.*—The act of street car men in knowingly operating on a steep incline a car with a useless brake, and relying entirely on the reverse electric current to control the car, is gross negligence, authorizing punitive damages for injuries to a passenger in a runaway because the electric current was cut off while the car was descending the incline.

Carriers—Injuries to Passengers—"Gross Negligence"—Instructions.†—In an action for injury to a street car passenger, an instruction that gross negligence is that which evinces a reckless disregard of indifference to the safety of others is favorable to the street railroad company, as "gross negligence" is the absence of slight care.

Carriers—Personal Injuries—Punitive Damages—Excessive Damages.—Where street car men knowingly operated on a steep incline a car with a useless brake, and relied entirely on reverse electric current, and a collision occurred because the current was cut off while the car was descending the incline, a verdict awarding \$1,000 as punitive damages was not excessive.

Trial—Right to Open and Close.—Where, in an action for injuries to a street car passenger, plaintiff sought to recover punitive damages because of gross negligence, and the street railroad offered to confess judgment for a sum less than was claimed in the petition without confessing its guilt of gross negligence, the burden of proof was on plaintiff, and he was entitled to open and close.

Damages—Personal Injury—Special Damages.‡—In an action for personal injuries, special damages, to be recoverable, must be specifically alleged.

Damages—Special Damages—Pleading.—An allegation of special damages in a blank sum amounts to no allegation of special damages and affords no basis for a judgment therefor.

Judgment—Erroneous Judgment—Correction.—Where, in an action for personal injuries, the jury awarded a specified sum for compensation and another for punitive damages and another for medical attention, the error in awarding the latter sum, arising from the in-

*For the authorities in this series on the question whether punitive or exemplary damages can be recovered for wrongs to passengers, see first foot-note of Cincinnati, etc., Ry. Co. (Ky.), 33 R. R. R. 235, 56 Am. & Eng. R. Cas., N. S., 235.

†For definitions of gross negligence, see third foot-note of Baker v. Tacoma E. Ry. Co. (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.

‡For the authorities in this series on the subject of pleading damages, see last foot-note of Lexington R. Co. v. Britton (Ky.), 33 R. R. R. 237, 56 Am. & Eng. R. Cas., N. S., 237.

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sufficiency of the petition, would be cured by disregarding that portion of the verdict, and judgment should be rendered for the other two sums, as directed by Civ. Code Prac. § 386, providing that judgment shall be given for the party whom the pleadings entitle thereto.

Appeal from Circuit Court, Fayette County.

Action by Samuel N. Johnson against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

Stoll & Bush and Morton, Webb & Wilson, for appellant.
Allen & Duncan, for appellee.

BAKER, J. The appellee, Samuel N. Johnson, while a passenger upon one of the cars of the Lexington Railway Company, was injured in a collision between the car upon which he was riding and the passenger train of the Chesapeake & Ohio Railroad on Broadway street in Lexington, Ky. To recover damages for his injuries he instituted this action against the Lexington Railway Company, alleging that the collision in which he was hurt was the result of the gross negligence of the employees of appellant in charge of the car upon which he was riding. The railway company filed an answer admitting the negligence of its employees, and offering to confess judgment for \$500, to be in full of the damages sustained by the plaintiff. It denied, however, gross negligence, and that plaintiff was entitled to recover damages for his injuries for a greater sum than \$500. The trial of the case resulted in a verdict for the plaintiff in the sum of \$1,600, which the jury divided as follows: \$100 for medical attention; \$500 for compensation; and \$1,000 for punitive damages. Upon the return of this verdict, the trial judge entered judgment for \$1,600, and the defendant (appellant) is here on appeal.

The salient facts of the injury complained of are as follows: The car upon which appellee was riding is known, as the "train car," because it meets the trains coming in on the Cincinnati, New Orleans & Texas Pacific Railway at its station near the southern limits of the city of Lexington. On the day of the accident, the employees knew that the brake by which the speed of the car was regulated was entirely useless because of some defect which is not explained in the record, and, as a result of this defect, it was necessary, in order to stop the car, to reverse the current of electricity which constituted the motor power. Between the railroad depot and the main part of the city of Lexington there is a steep incline on Broadway street, at the foot of which the trains of the Louisville & Nashville and the Chesapeake & Ohio Railroads cross the street. Appellee had come in on the Cincinnati, New Orleans & Texas Pacific Railway, and boarded the street car with several other passengers, for the purpose of riding into town. The car started, and it was at once apparent that the brake

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was entirely useless, and that, in order to control the speed of the car while going down the steep incline on Broadway, it was necessary to rely entirely upon the reverse current of the electricity. This, as said before, was well known to those in charge of the car, and they also knew that at the bottom of the hill they were liable to encounter the crossing trains of the Louisville & Nashville and Chesapeake & Ohio Railroads. They further knew that, if anything occurred by which the current was cut off while the car was descending the hill, they had no means by which to stop its headlong passage, or by which they could protect the passengers from injury if a collision was imminent either with a crossing train or any other heavy vehicle which it might encounter on the downward passage. The employees seems not even to have taken the precaution to notify those in charge of the power house of their precarious condition, so that extra precaution might be taken to keep the current strong and regular. As soon as the car started down the hill on Broadway street, for some reason not explained the current was cut off, and the car at once started, under the influence of the law of gravitation, to run swiftly down the incline; those in charge having no power to control its rapid descent. At this time the passenger train of the Chesapeake & Ohio Railroad was crossing Broadway street at the foot of the incline, and appellant's flying car crashed into it, overturning the baggage car of the crossing train, and more or less injuring all of the passengers on board appellant's car. It seems to us that this conduct on the part of the employees of appellant was not only grossly negligent, but criminally negligent. To conceal from the passengers the defect in the brake, and then run the car down a steep incline, depending upon the uncertain current of electricity as the only protection against danger to life or limb, cannot be correctly characterized by any term less than "gross negligence." This being true, the appellee was entitled to an instruction that the jury might award punitive damages.

The court, on the subject of punitive damages, instructed the jury as follows: "Gross negligence is that kind of negligence which evinces a reckless disregard of, or a reckless indifference to, the safety of another or others." Of this instruction appellant complains. "Gross negligence" has often been defined as the absence of slight care, and, if there be any substantial difference between this definition and the instruction given by the court, it is a difference of which the plaintiff might complain, but not the defendant. It seems to us that the instruction of the court accurately defines the degree of negligence of which the appellant's employees were guilty. Appellant insists that the court should have defined "gross negligence" in this case as in *L. & N. R. R. Co. v. McCoy*, 81 Ky. 413, which is as follows: "In the management of a railroad, or any department thereof, 'gross negligence'

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is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to those which may be under investigation." A comparison of the instruction complained of with that which appellant insist should have been given will show that the difference was in favor of appellant, and not against it, and, while appellee might have complained of the instruction given, appellant cannot.

We do not think the amount of the punitive damages—\$1,000—was excessive. Such negligence as this record discloses should be punished, and we are not disposed to say that \$1,000 is too great a sum as punitive damages.

The appellant did not have the burden of proof upon the trial, and was not entitled to open and close the case. It is true, it offered to confess judgment for \$500; but this was not as great a sum as that claimed in the petition, nor did the petition confess to the guilt of gross negligence, and therefore the burden of proof was upon plaintiff to prove the disputed part of the claim in the petition. *Louisville & Eastern Ry. Co. v. Mann*, 104 S. W. 362, 31 Ky. Rep. 986; *Southern Ry. in Kentucky v. Steele*, 123 Ky. 262, 90 S. W. 548, 28 Ky. Law Rep. 764; *Id.*, 123 Ky. 262, 94 S. W. 653, 29 Ky. Law Rep. 690.

The appellant also insists that the court erred in giving judgment for the sum of \$100 awarded in the verdict for medical services. This objection is based upon the fact that the petition alleges, in regard to his outlay for medical services, as follows: "That plaintiff has been compelled to pay for medical services on account of said injuries the sum of \$——— and the further sum of \$——— for medicine." We have uniformly held that, in order to recover special damages, it must be specifically alleged; and we have also frequently held that, where the special damage is alleged to be a blank sum, this amounts to no allegation for special damages at all and affords no basis for a judgment. *Lexington Ry. Co. v. Britton*, 114 S. W. 295; *Central Ky. Traction Co. v. Chapman*, 113 S. W. 438; *C. & O. R. R. Co. v. Crank*, 128 Ky. 329, 108 S. W. 276, 32 Ky. Law Rep. 1202, 16 L. R. A. (N. S.) 197; *L. & N. R. R. Co. v. Dickey*, 104 S. W. 329, 31 Ky. Law Rep. 894; *Macon v. Paducah Street Ry. Co.*, 62 S. W. 496, 110 Ky. 687; *Jesse v. Shuck*, 12 S. W. 304, 11 Ky. Law Rep. 463. As the jury in its verdict specifically set forth the amount alleged for medical services, the plaintiff was not entitled to a judgment for that amount on the verdict. The court should have disregarded that portion of the verdict and entered judgment only for \$1,500. Section 386 of the Civil Code of Practice is as follows: "Judgment shall be given for the party whom the pleadings entitled thereto, though there may have been a verdict against

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him." See, also, *Chaney v. Bevins*, 96 S. W. 1129, 29 Ky. Law Rep. 1219.

Inasmuch as the court entered a judgment for \$1,600, when it should have entered one for only \$1,500, the judgment must be reversed, with instructions to the court below, when the case returns, to enter a judgment in favor of the plaintiff for \$1,500; and it is so ordered.

ST. LOUIS & S. F. R. CO. v. GARNER.

(Supreme Court of Mississippi, Feb. 14, 1910.)

[51 So. Rep. 273.]

Carriers—Passengers—Duty to Stop Train—Signal of Passenger.

—A railroad company is entitled to have trains started and stopped by its employees, and where it maintains an agent at a flag station, whose duty it is to signal trains to stop, the engineer's failure to stop a train on the signal of a prospective passenger is not negligence; and hence, in an action for damages for failure to stop, it was error to submit the question whether the engineer should have obeyed a signal made by others than the agent.

Carriers—Failure to Stop for Passenger—Punitive Damages—Instructions.*—In an action against a railroad company for damages for failure to stop and take up passengers at a flag station, it was error to charge that an award of punitive damages might be made if the engineer could, by the exercise of ordinary care and diligence, have seen the signal to stop and understood it.

Appeal from Circuit Court, Monroe County; Jno. H. Mitchell, Judge.

Action by V. E. Garner against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

E. O. Sykes, Jr., for appellant.

Paine & Paine, for appellee.

SMITH, J. Greenwood Springs is a station on appellee's road where its trains stopped when flagged by the agent in charge of the station. On May 31, 1907, appellant and several others, having notified the agent that they desired to take passage on one of appellant's trains, were at the depot for that purpose. As the train approached, appellant and his companions signaled the engineer to stop, by waving their suit cases across the track. There is some evidence, also, that the agent signaled the engineer by waving his hands. The agent testified that he was not at the de-

*See first foot-note of preceding case.

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pot when the train whistled, that he got back to the depot just before the train passed, and that the only signal he made was "to hold up four fingers," to indicate to the engineer that he had four passengers. The engineer did not stop his train, and stated that he saw several parties at the station, but did not see any signal made. From a judgment awarding appellee punitive damages on account of the failure of the engineer to stop the train, this appeal is taken.

At the request of appellee the court gave the following instruction to the jury: "The court charges the jury that they are the sole judges of the amount of damages, from the evidence in the case, sustained by the plaintiff, and if they believe from the evidence in the case that the engineer in charge of the engine saw the signal made by the plaintiff and others at Greenwood Springs station on May 31, 1907, if they from the evidence believe there was a signal made to stop, or if the engineer in charge of the engine on the evening of May 31, 1907, at Greenwood Springs station, could by the exercise of ordinary care and diligence have seen the signal to stop, and understood the signal, and failed to stop the train, and that the failure to stop was due to the capriciousness or recklessness or malice or willfulness on the part of the said engineer, then the jury may assess the defendant with punitive damages; that is, damages by way of punishment to compel the defendant to have due regard for the rights of the public, and return a verdict for the plaintiff, in any sum not exceeding the amount of damages sued for." The giving of this instruction was fatal error:

First. Because it submitted to the jury the question of whether the engineer obeyed a signal made by persons other than the station agent. Under the evidence the only signal the engineer was required to obey was one made by the station agent. There was no evidence that appellant was accustomed to stop its trains on signals made by intending passengers; but, on the contrary, it maintained at this station a depot, with an agent in charge thereof, whose duty it was to signal trains when it became necessary for trains to stop. A railroad company is entitled to have the starting and stopping of its trains regulated by its employees, and when it maintains an agent at a flag station, whose duty it is to signal trains when it becomes necessary for same to stop at such station, the failure of its engineer to stop on the signal of an intending passenger is not negligence. The negligence here complained of is not that of the station agent, but of the engineer.

Second. Because it permitted the jury to award punitive damages if the engineer "could by the exercise of ordinary care and diligence have seen the signal to stop." Railroad Company v. Lanning, 83 Miss. 161, 35 South. 417.

Reversed and remanded.

MISSOURI PAC. RY. CO. *v.* IRVIN.

(Supreme Court of Kansas, Feb. 12, 1910.)

[106 Pac. Rep. 1063.]

Carriers—Injury to Passengers—Contributory Negligence.*—It is not negligence per se to get on or off of a moving train; but whether it is negligent or not is a question of fact and proper for the determination of a jury.

Carriers—Injuries to Passengers—Depot Platforms.†—It is the duty of a railroad company to keep its depot platforms reasonably safe and free from obstacles upon which passengers are liable to be injured.

Carriers—Injuries to Passengers—Obstruction of Depot Platform.—It is negligence to leave an express truck upon an unlighted depot platform after night and within five inches of a passing passenger train.

Carriers—Injury to Passengers—Obstruction on Platform.—A railroad company cannot avoid its liability to passengers on account of dangerous obstacles upon its depot platform on the ground that such obstacles were placed thereon by an express company which was permitted to occupy and use such platform for its own purposes.

Trial—Confused or Misleading Instructions.—An instruction which was requested by the defendant and refused by the court examined, and held to have been properly rejected.

Appeal and Error—Harmless Error—Instructions.—An instruction given by the court examined, and held not error.

(Syllabus by the Court.)

Appeal from District Court, Rush County; Charles E. Lobdell, Judge.

Action by Albert Irvin against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action commenced in the district court of Rush county by Albert Irvin as plaintiff to recover from the Missouri Pacific Railway Company, as defendant, damages for a

*For the authorities in this series on the question whether it is contributory negligence in a passenger to alight from a train or street car while it is moving, see extensive note, 32 R. R. R. 753, 55 Am. & Eng. R. Cas., N. S., 753; *Sevier v. Southern Ry. Co.* (S. Car.), 33 R. R. R. 198, 55 Am. & Eng. R. Cas., N. S., 198.

†For the authorities in this series on the question whether it is contributory negligence to board a moving train, see third foot-note of *Gannon v. Chicago, etc., Ry. Co.* (Iowa), 31 R. R. R. 27, 54 Am. & Eng. R. Cas., N. S., 27; first foot-note of *Gybs v. Southern Ry. Co.* (S. Car.), 29 R. R. R. 604, 52 Am. & Eng. R. Cas., N. S., 604.

†See foot-note of *Missouri, etc., R. Co. v. Criswell* (Tex.), 29 R. R. R. 673, 52 Am. & Eng. R. Cas., N. S., 673; *Merryman v. Chicago G. W. Ry. Co.* (Iowa), 27 R. R. R. 94, 50 Am. & Eng. R. Cas., N. S., 94.

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personal injury received by him at the station of McCracken on said railway in said county on account of the negligence of said defendant. The plaintiff lived at McCracken and went to the station about the time the train arrived. When the train stopped, a friend of the plaintiff, Albert Smith, got off onto the platform. They met, and plaintiff invited Smith to stay all night, and he would drive him into the country where he wanted to go early in the morning. Smith declined, and asked the plaintiff to get on the train and go with him. While they were talking, the call "All aboard" was given. The train started and they both jumped on the step at the rear end of the smoker; Smith first, and the plaintiff after him. Smith stepped on the second step, and the plaintiff was for that reason compelled to stand on the first or lower step. One of his feet hung over about five inches and struck an express truck and was injured. The platform at the station was not lighted. The facts in detail as found by the jury read: "(1) Question. What time did the defendant's train arrive at the station of McCracken on the evening of April 14, 1906? Answer. 10:15 p. m. (2) Q. How long did said train remain at said station of McCracken? A. 5 to 10 minutes. (3) Q. How many cars were there in said train? A. Five. (4) Q. Was said train a passenger train? A. Yes. (5) Q. About how many passengers, if any, got off said train at McCracken? A. Two. (6) Q. About how many persons other than the plaintiff got onto said train at McCracken? A. One or two. (7) Q. Did plaintiff attempt to get onto said train after it started to leave said station? A. Yes. * * * (9) Q. What car did plaintiff attempt to get onto? A. Smoking car. (10) Q. If the plaintiff had boarded train immediately after all passengers who were destined for McCracken had alighted, would he have had ample time to have gotten into the car before said train started? A. Yes. * * * (12) Q. When plaintiff stepped onto the first step of said passenger coach, how far was the express truck from him? A. About 60 feet. (13) Q. As said train passed by said express truck, what was the distance between the said train and the express truck? A. Five inches. (14) Q. Do you find that plaintiff stood with one foot on the lower step of said passenger coach, and permitted the other foot and leg to swing or protrude beyond the surface of side of said car? A. Yes. * * * (16) Q. Was there anything to have prevented the plaintiff from placing both of his feet upon the lower step of said passenger car upon which he was riding at the time of the injury complained of? A. No. * * * (18) Q. If plaintiff had placed both his feet upon the lower step of said car, would he have been struck by said express truck? A. Yes. (19) Q. What was there, if anything to have prevented plaintiff from placing both of his feet upon the lower step of said car, standing erect, and thus preventing any part of his body from protruding beyond the surface or side of said car? A. A passen-

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ger. (20) Q. After said train stopped and discharged the passengers destined to McCracken, how long did plaintiff remain upon the station platform before he attempted to board said train? A. About five minutes. (21) Q. When plaintiff went to said station did he have any intention of becoming a passenger upon said train? A. No. (22) Q. Do you find that plaintiff, at any time, intended to become a passenger upon said train? A. Yes. (23) Q. If you answer the next preceding question 'Yes' then state when, with reference to the time he got upon the step of said coach, he made up his mind to become a passenger upon said train. A. When he boarded the train. (24) Q. When plaintiff stepped upon the first step of said passenger coach, was there any person preceding him? A. Yes. (25) Q. If you answer the next preceding question 'Yes' then state who said person was. A. Albert Smith. (26) Q. If you answer question No. 24 'Yes,' then state where said person was who was entering said coach ahead of plaintiff? A. Standing on second step of car. (27) Q. If you find that one Albert Smith was entering said coach ahead of plaintiff, then state if he is the party with whom plaintiff was talking while said train remained at said station. A. Yes. (28) Q. Did plaintiff get onto the rear of said coach, or the front end thereof? A. Rear. (29) Q. What was the length of said passenger coach which plaintiff claims he attempted to board? A. About 50 feet. (30) Q. Was baggage and express car the next car in front of said car upon which plaintiff was riding? A. Yes. (31) Q. What was the length of said baggage and express car? A. About 50 feet. (32) Q. Was there a door in the center of the side of the said car used for the purpose of receiving and discharging baggage and express? A. There were two doors. (33) Q. Had said express truck by which plaintiff claims to have been struck been used to load express only into said baggage car before said train started from said station? A. Yes. (35) Q. Did said plaintiff know that said express truck was near the train at the time he stepped onto the lower step of said coach? A. No. (36) Q. Did one Albert Smith alight from said passenger train at the station of McCracken and engage in a conversation with plaintiff? A. Yes. (37) Q. Did said Albert Smith alight from said train at the station of McCracken for the purpose of terminating his journey or for the purpose of talking with plaintiff? A. For the purpose of seeing if any of his family was there. (38) Q. Did plaintiff know that Albert Smith would be a passenger upon said passenger train when he went to said station that night? A. No. (39) Q. How long had plaintiff been at said station before the arrival of the passenger train? A. About five minutes. (40) Q. As said train stood at the station of McCracken, what was the distance between the end of the car that plaintiff got on and said baggage trucks? A. Between 75 and 80 feet."

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B. P. Waggener, W. P. Waggener, Geo. G. Orr, and S. I. Hale,
for appellant.

G. R. McKee, for appellee.

GRAVES, J. (after stating the facts as above). The appellant contends that the plaintiff was guilty of contributory negligence for the reason that he boarded a moving train. It is not necessarily negligent to get upon a moving passenger train, and generally whether it is negligent or not is a question for the jury. *Railway Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31; 3 Thompson on Neg. 2995, 2996; *Distler v. R. R.*, 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; *Chicago, etc., R. R. v. Gore*, 202 Ill. 188, 66 N. E. 1063, 95 Am. St. Rep. 224; *Chicago, etc., R. R. v. Winters*, 175 Ill. 293, 51 N. E. 901. In this case the question of contributory negligence was specially pleaded and relied upon as a defense. The general verdict finds in favor of the plaintiff upon all the issues presented. It seems too late therefore to raise this question now. The parties are concluded by the verdict.

The plaintiff did not intend to take the train until it began to move, when he determined to go. There was no time then to buy a ticket. The necessity was presented to get on the train immediately or forego the contemplated trip. He had the money with which to pay his fare, and he, in good faith, attempted to get upon the train as a passenger. He would have been inside the car in a moment had he not been stopped by Smith who stood upon the step next above where he stood. He was in no way responsible for the obstacle presented by this other passenger. It has been the general practice of passengers in this state when not prevented by the rules of the company, to board trains in this manner or any other manner which best suited their convenience, and this practice has been generally acquiesced in by railroad companies. No rules or regulations upon this subject were in force upon the appellant's road at the time the appellee was injured. Under the circumstances here shown we see no good reason for holding that the plaintiff was not a passenger.

It has been suggested that the truck upon which the plaintiff was injured belonged to the Pacific Express Company, and the court was requested to submit special questions of fact to the jury which apparently were intended to establish that this express company not only owned the truck, but also that it was used by that company upon that evening delivering express matter to the train upon which plaintiff was injured. We are unable to see the importance of this evidence or of the fact if established. The railway company owned the station, the platform, and the track, and was operating a passenger train as a common carrier. It thereby became charged with all the responsibilities and liabilities imposed by law upon a common carrier of passengers, and could not avoid the duties thus imposed by permitting a third person to

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transact business upon its platform, and negligently place dangerous obstacles where they would be liable to injure passengers whom it was the duty of the railway company to protect from danger. This train passed in the nighttime; the platform was dark; plaintiff was not aware of the presence of this truck. It is the duty of a railway company to keep its platform reasonably clear and free from obstacles upon which passengers are liable to be injured. This truck was left in the darkness within five inches of the passenger car and within a few feet from where it had just been used in loading express matter onto the train. This was negligence, and it must be treated as the negligence of the railway company regardless of who owned the truck or whose employee placed it in a position dangerous to people on the passenger train.

The district court refused to give an instruction to the jury requested by the appellant, which reads: "The jury is instructed that the plaintiff contends that, by reason of the fact that Albert Smith stopped on the second step of said passenger car, he was prevented from getting upon said platform, and was consequently injured. There is no claim that there was any connection between the act of said Smith in remaining upon said step and the position of said express truck, and as one person is not liable for the injury done by another unless they act in concert, the defendant would not be liable in this case if the accident was the result of Smith's obstructing the plaintiff from getting upon the car." It is difficult to say what specific legal proposition was intended to be presented by this instruction. The court might well have refused to give it because calculated to confuse and mislead the jury. It is not clear and specific as all instructions should be. With doubt and hesitation we assume that the intention of the instruction was to have the jury advised as matter of law that the proximate cause of the injury was Smith, and not the express truck. The cases cited, however, in support of the instruction, would justify the inference that the intention may have been to have the court say to the jury in effect that the case ought to have been brought against Smith instead of the company. But whatever may have been the intention, we are unable to say that the court erred in refusing to give the instruction to the jury.

Objection has been made to an instruction given by the court upon its own motion which reads: "It is the duty of the persons in charge of a passenger train in starting and stopping such train at a station to look to the safety of passengers, and not to start or stop such train in such manner as to result in the injury of a person in getting on or off thereof and using proper care for his own safety." Under the evidence this instruction was not material. The injury of which the plaintiff complains was not caused by the mere manner in which the train was started, and the instruction might well have been omitted; but we are unable to perceive how the jury could have been misled or confused by it, or how the

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rights of the defendant could have been materially prejudiced thereby, and we cannot say that error sufficient to justify a reversal was committed by the court in giving it.

We do not find any material error in the case, and the judgment of the district court is affirmed. All the Justices concurring.

CURTIS v. SOUTHERN RY. CO. et al.

(Supreme Court of North Carolina, Dec. 23, 1909.)

[66 S. E. Rep. 599.]

Carriers—Action for Death of Passenger—Burden of Proof.*—In an action for negligently killing a passenger in a collision, the burden was on defendants to show that they discharged their duty to him.

Appeal from Superior Court, Buncombe County; J. S. Adams, Judge.

Action by T. E. Curtis, administrator of B. Allen Bryant, against the Southern Railway Company and another. From a judgment for plaintiff, defendant company appeals. No error.

Civil action to recover damages on account of the negligent killing of plaintiff's intestate, B. Allen Bryant, a passenger who was admitted to have been killed in a collision between a passenger and freight train of defendant company, alleged to have been caused by the negligence of the defendant Leonard, a brakeman in the company's employment, tried at September term, 1909, of the superior court of Buncombe county, his honor Jos. S. Adams, judge presiding. The two issues of negligence and damage were submitted and found for the plaintiff. The defendant appealed.

Moore & Rollins and W. B. Rodman, for appellant.

Zeb. F. Curtis and Craig, Martin & Thompson, for appellee.

PER CURIAM. 1. In respect to the issue of negligence the matter in controversy is one of fact purely, with the burden upon the defendants to show that they discharged their duty to the passenger, and we find no error committed on the trial of it.

2. In respect to the assignment of error in the charge of the judge upon the issue of damage, we are of opinion that it is unnecessary to pass upon or discuss it. The evidence in regard to the net earnings of the deceased and his age and condition in life, business, etc., is uncontradicted, and we think that it fully warrants the sum awarded by the jury even if it be gauged with reference to the theory contended for by defendant.

No error.

The CHIEF JUSTICE did not sit on the hearing of this case.

*See extensive note, 31 R. R. R. 697, 54 Am. & Eng. R. Cas., N. S., 697.

PENSACOLA ELECTRIC CO. *v.* ALEXANDER *et al.*

(Supreme Court of Florida, Division A., Nov. 20, 1909.)

[50 So. Rep. 673.]

Carriers—Injury to Passenger—Question for Jury.*—Evidence that a passenger was injured by the sudden starting of an electric car, while alighting, with others, who were frightened by flashes of electricity, and that such flashes were caused by the carelessness or inexperience of the motorman, makes a question for the jury.

Carriers—Injury to Passenger—Evidence.—When it is in evidence that the motorman was new at the business and may have used the brake improperly, whereby the injury was caused, the railway company has not made it appear that it used even ordinary care and caution.

Carriers—Injury to Passenger—Burden of Proof—Instruction.*—An instruction that “the burden of proof is upon the plaintiff to show that the cause of the accident was due to the negligence of defendant, and, if you are not satisfied by a preponderance of evidence that the plaintiff’s injury was the result of negligence of the defendant or its employees, you will find for the defendant,” is properly refused, when the plaintiff was injured by the operation of an electric car.

(Syllabus by the Court.)

Error to Circuit Court, Escambia County; J. E. Wolfe, Judge.

Action by John H. Alexander and another against the Pensacola Electric Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Blount, Blount & Carter, for plaintiff in error.

Jones & Pasco, for defendants in error.

COCKRELL, J. This is an action for personal injuries, occasioned by the alleged negligence of the Pensacola Electric Company in the operation of its street car.

There was evidence from which the jury could find that Mrs. Alexander, a passenger, was injured by the negligence of the employees of the company in starting suddenly the car while many passengers were in the act of alighting therefrom, being frightened by flashes of electricity, and, further, that these flashes were unnecessarily caused by the carelessness or inexperience of the motorman. These acts were sufficient to make a case for the jury on the question of negligence, and therefore the affirmative instruction to find the defendant not guilty was properly refused.

*See foot-note of preceding case.

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It is argued that no negligence was shown, in that the present knowledge of electricity cannot prevent absolutely these flashes and burning of fuses, even when the greatest care is used. We need not now dwell on the availability of this defense, as it does not appear here that even ordinary care and caution was used. The chief eyewitness for the defense, the conductor on the car, testified the motorman was a new man, and may have caused the trouble by improper use of the brake. The motorman was not a witness, and no proof was offered as to his skill, habits, or experience.

The court refused to instruct the jury, as requested by the defendant, as follows: "The burden of proof is upon plaintiff to show that the cause of the accident was due to the negligence of defendant, and if you are not satisfied by a preponderance of evidence that the plaintiff's injury was the result of negligence of the defendant, or its employees, you will find for the defendant." The statute makes the fact of injury by the running of the car *prima facie* evidence of negligence in its operation, thus shifting the former burden of proof, and casting it upon the party most likely to possess the knowledge of the real cause of the injury. It is not founded wholly, if at all, as argued by the plaintiff in error, upon the idea of "*res ipsa loquitur*," upon which the cases cited are based, and to have given the charge would have been to ignore the statute and numerous decisions of this court construing it. See Seaboard Air Line Ry. Co. v. Smith, 53 Fla. 375, text 388, 43 South. 235, and cases there cited.

The various counts in the declaration sufficiently apprised the defendant of the manner of the accident to prevent a charge of variance between allegation and proof.

The judgment is affirmed.

WHITFIELD, C. J., and SHACKLEFORD, J., concur.

TAYLOR, HOCKER, and PARKHILL, JJ., concur in the opinion.

CHICAGO, R. I. & P. RY. CO. v. JAMES.

(Supreme Court of Kansas, Nov. 6, 1909.)

[105 Pac. Rep. 40.]

Injury to Passengers.—A car of a freight train moving about 30 miles an hour between stations was ignited by sparks from the engine. The conductor discovered the fire, and announced it to several passengers in the caboose. One of them ran to the rear platform, and was looking forward along the side of the train, when a severe lurch caused by the application of the brakes by the engineer threw him to the ground, causing severe injuries. In an action to recover damages therefor, held, evidence that the conductor called out in a loud voice and excited manner within the hearing of the passengers that the train or a car was on fire, and that thereupon the plaintiff became excited and alarmed, and ran to the rear platform to see where the fire was, and what danger he was in, if any, and to provide for his safety if there was any danger from fire, his injury resulting from his being upon the platform while the train was suddenly stopped, does not tend to establish such negligence on the part of the conductor as to render the company liable.

Injury to Passengers—Evidence.—Evidence that the lurch which threw the plaintiff to the ground was caused by the engineer making an emergency application of the air brakes, and that the train could have been stopped almost as quickly, and with less jolting, by a more gradual application, resulting in an ordinary or service stop, does not tend to establish such negligence on the part of the engineer as to render the company liable.

Johnston, C. J., and Mason and Benson, JJ., dissenting.

On Rehearing.

Carriers—Injury to Passengers—Negligence of Conductor.—Where the conductor of a freight train while riding in the caboose with a number of passengers discovers that one of the cars is on fire and announces the fact in a loud voice and excited manner, his conduct may be such as naturally to lead the passengers to suppose that the interior of the caboose has become a place of danger and to seek safety on the platform; and held that, under the facts of this case, whether his conduct was of that character was a question for the jury.

Carriers—Injury to Passengers—Negligence of Conductor.—It is negligence for a conductor to cause a passenger to go upon the platform unnecessarily at a time when a sudden stopping of the train is to be expected.

Carriers—Injuries to Passenger—Action—Contract of Carriage—Accrual of Right of Action.—Where a contract provides that no suit shall be brought upon it unless within six months after a cause of

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action shall accrue, and that the giving of a notice within a fixed time shall be a condition precedent to the bringing of such suit, assuming these provisions to be valid, the six months within which the suit must be brought does not begin to run until the notice is given.

Burch and Porter, JJ., dissenting.

(Syllabus by the Court.)

Error from District Court, Marion County; O. L. Moore, Judge.

Action by A. C. James against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 100 Pac. 641.

M. A. Low, Paul E. Walker, and J. D. McFarland, for plaintiff in error.

W. H. Carpenter, for defendant in error.

MASON, J. A. C. James, with other passengers, was riding in the caboose of a freight train on which he had cattle in shipment. Sparks from the engine ignited hay in one of the cars. The conductor discovered the fire, and uttered an exclamation regarding it. James ran to the rear platform, from which he fell, receiving serious injuries, on account of which he brought an action against the railway company, recovering a judgment to reverse which this action is brought. A number of questions have been argued, but the view taken of the matter by this court makes it necessary to consider only this one: Did the evidence tend to charge the company with actionable negligence either (a) by reason of the manner in which the conductor and brakeman announced to the passengers the existence of the fire, or (b) by reason of the fact that the engineer by using the emergency brake, instead of a less abrupt means of stopping the train, caused an unnecessary lurch of the caboose?

The evidence necessary to a determination of the first part of this inquiry is found largely in the testimony of the plaintiff, and may be fairly summarized thus: The train was between stations running about 30 miles an hour. About noon the conductor, who was seated with the passengers under the cupola, said in an excited manner and in a voice so loud that they heard him distinctly above the rumbling of the train either "This damn train is burning," or "That damned car is afire." A brakeman who had been in the cupola at once jumped to the floor, and said, "Take buckets," or "Grab buckets," adding something about the fire. The plaintiff, being much excited and alarmed by the word "fire," rushed to the rear of the car to see where the fire was and what danger he was in, if any, and to provide for his safety if there was danger from fire. He went out upon the platform, descended to the first step, and looked up the side of the train,

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when a lurch of the car threw him off. The theory of the plaintiff is that the conduct of the conductor and brakeman was of such a nature that the effect produced on the plaintiff could reasonably have been anticipated, and that it was negligence to communicate to him the fact of the fire in such a manner. This feature of the case turns upon the soundness of this contention. None of the cases cited by either party is of any special value in determining this question. Of course, a panic might well be regarded as the natural result of an abrupt announcement of a fire made on a vessel at sea, or in a crowded auditorium, or even in any large building. But the possible peril to passengers in a caboose from a fire elsewhere in the train is not so imminent or so great as to present an analogous situation. If the action of the trainmen in announcing the fire did constitute negligence, it must be because it was their duty either to conceal from the plaintiff the fact of the fire, or in telling him of it to caution him to remain in the car, or at least to advise him that he was in no personal danger. The words used contained nothing to suggest any dangerous condition beyond the mere fact that a car somewhere on the train was on fire. They were not addressed specifically to the passengers. That they were spoken loudly did not add to or change their meaning. The noise of the train required them to be loud in order to be heard. And their significance could not be affected by their having been uttered in what the plaintiff regarded as an excited manner. The expression used by the conductor suggested the excitement of irritation rather than of fear. This court is of the opinion that as a matter of law it was not negligence for the trainmen to inform the passengers of the existence of a fire on the train, or to give the information without any accompanying assurance that there was no immediate danger, or to make the announcement in a loud voice and in a manner deemed to show excitement.

The direct evidence on the subject of the engineer's conduct was that on his discovery of the fire the train was brought to a standstill by the ordinary or service stop. There was such evidence, however, of the different effects ordinarily produced, according to how the air brake is used, and of the degree of jolting that actually resulted in this instance, as to leave room for the inference that in fact an emergency application was made. For the purposes of the case, therefore, the evidence must be deemed to have established that the emergency stop was used, instead of the service stop. The time thereby saved is shown to have been slight, and the argument is made in behalf of the plaintiff that the more gradual method would have answered the purpose as well as the abrupt one that was employed, and that the lurch of the caboose that caused his fall was due to the unnecessarily sudden application of the brake, which therefore constituted actionable negligence. In the solution of this question, as of

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that already discussed, little aid is to be had from the decisions. The general principle is not doubtful. The only difficulty lies in its application. The court concludes, however, that where an engineer of a freight train containing cattle, the shippers of which are riding in the caboose, discovers while between stations a fire in one of the cars, he is justified in bringing his train to a stop as soon as is consistent with safety to the passengers while in the caboose, and his use of the speediest means to accomplish that purpose, although it necessarily results in more or less severe jolting, cannot be regarded as such negligence as to charge the railway company with liability for injuries resulting to a passenger standing on the platform of the caboose of whose presence in that place he had no knowledge.

It results from this view that the demurrer to the plaintiff's evidence should have been sustained, and on that account the judgment is reversed.

BURCH, SMITH, PORTER, and GRAVES, JJ., concurring.

JOHNSTON, C. J., and MASON and BENSON, JJ., dissenting.

On Rehearing.

MASON, J. The facts are stated in the original opinion. The vital inquiry for the further consideration of which a rehearing was granted is this: Did the evidence justify the trial court in submitting to the jury the question whether the words and conduct of the conductor and brakeman on the discovery of the fire were such as naturally to lead the plaintiff to suppose that by reason of it the interior of the caboose had become a place of danger, and to seek safety on the platform? If so, the verdict must stand; for, of course, it is negligence for trainmen to cause a passenger to go upon the platform unnecessarily at a time when a sudden stopping of the train is to be expected. If the conductor had called out that a collision or wreck was imminent, or had warned the passengers to leave the car, a rush to escape would obviously have been a natural consequence. That a fire in any part of a freight train could occasion immediate peril to the occupants of a caboose, but seven in number, seems very unlikely. But the court concludes that an announcement of a fire under such circumstances might be made in so sudden, startling, and alarming a manner as naturally to cause a momentary panic, and that whether the announcement made in this case was of that character is a question upon which reasonable minds might differ, and therefore was a fair matter for the determination of the jury.

The plaintiff in shipping his cattle signed a contract containing a provision that no suit should be brought by him to recover any claim by virtue of it unless within six months after the cause of action should "occur," obviously meaning "accrue." The injury was received July 9, 1905, and the action was brought Jan-

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uary 10, 1906. The contract also provided that as a condition precedent to the bringing of any suit for damages for any injury to persons or property covered by it the claimant should give the company notice of the claim within 90 days after the injury. Such a notice was given in September, 1905. Therefore, assuming that the contract was valid, the suit was brought in due time, for the cause of action did not accrue until the giving of the notice, and the plaintiff had six months thereafter in which to file his petition.

The judgment is affirmed.

JOHNSTON, C. J., and SMITH, GRAVES, and BENSON, JJ., concurring.

BURCH and PORTER, JJ., dissenting, on the grounds stated in the original opinion.

SOUTH C. & C. ST. RY. CO. v. CRUTCHER.

(Court of Appeals of Kentucky, Dec. 9, 1909.)

[123 S. W. Rep. 268.]

Carriers—Injuries to Passengers—Contributory Negligence—Action—Emergency.*—Plaintiff, a woman 69 years of age, was injured while riding on defendant's street car by a collision between the car and an ice wagon approaching each other at right angles at a crossing. Plaintiff saw the wagon and the danger of collision just before it occurred, when she got up and stepped to the other side of the car as she saw other passengers doing; and, when the collision occurred, she was thrown forward onto the back of a seat, and the tongue of the wagon, entering the car, dragged down over her back and hip. Held, that plaintiff's act in moving from her position was done in an emergency not of her creation, and the fact that she made an unwise choice of means to escape did not constitute contributory negligence.

Street Railroads—Injuries to Passengers—Street Car Collision—Duty of Motorman.†—A street car motorman in approaching a cross-

*See last foot-note of *Rundgren v. Boston & N. St. R. Co.* (Mass.), 32 R. R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685; sixth head-note of *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 32 R. R. R. 438, 55 Am. & Eng. R. Cas., N. S., 438; eighth head-note of *Colorado M. R. Co. v. Brady* (Col.), 32 R. R. R. 113, 55 Am. & Eng. R. Cas., N. S., 113; last head-note of *Kern v. Des Moines City R. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

†For the authorities in this series on the subject of the duty of those in charge of street cars to maintain lookout in order to avoid collisions with other users of streets, see note, 21 R. R. R. 268, 44 Am. & Eng. R. Cas., N. S., 268; *Wilkie v. Richmond Traction Co.* (Va.), 30 R. R. R. 659, 53 Am. & Eng. R. Cas., N. S., 659 (duty at points frequented by public); *South Covington, etc., Ry. Co. v.*

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ing, while bound to keep a lookout for persons or vehicles crossing or about to cross the track, is not required to stop and look up and down the street he is crossing; his primary duty being to look ahead and observe persons or vehicles approaching the track within the ordinary range of his vision while so looking, being entitled to presume that the driver of a vehicle approaching the track will have his team under control.

Carriers — Injuries to Passengers — Streets — Collision with Ice Wagon—Negligence.—Where an ice wagon which collided with a street car at a crossing was not within the motorman's ordinary range of vision as he was looking ahead when he started to cross the track, but was approaching the crossing at a high rate of speed, and when the motorman saw that a collision was imminent, and stopped the car in the middle of the street, the wagon was only 10 or 12 feet distant, and to have kept the car in motion would have increased the force of the collision, the motorman was not negligent in failing to observe the wagon earlier or in stopping the car.

Besse (Ky.), 29 R. R. R. 369, 52 Am. & Eng. R. Cas., N. S., 369 (general rule); Kinlen v. Metropolitan St. Ry. Co. (Mo.), 32 R. R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722 (ordinary care requires motorman to keep vigilant watch, for those who, from any cause are exposed to danger of being struck by his car); McDermott v. Severe (U. S.), 21 R. R. R. 628, 44 Am. & Eng. R. Cas., N. S., 628; Peterson v. St. Louis Transit Co. (Mo.), 22 R. R. R. 732, 45 Am. & Eng. R. Cas., N. S., 732; Beir v. St. Louis Transit Co. (Mo.), 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281; Paducah Traction Co. v. Sine (Ky.), 30 R. R. R. 755, 53 Am. & Eng. R. Cas., N. S., 755 (duty to lookout for other vehicles); McQuade v. St. Louis, etc., Co. (Mo.), 22 R. R. R. 727, 45 Am. & Eng. R. Cas., N. S., 727 (care required of motorman in looking out for pedestrians); Sample v. Consolidated, etc., Co. (W. Va.), 4 R. R. R. 380, 27 Am. & Eng. R. Cas., N. S., 380 (care required of motorman in looking out for children); Jones v. United Traction Co. (Pa.), 1 R. R. R. 395, 24 Am. & Eng. R. Cas., N. S., 395 (negligence in running over child on street car track); Gray v. St. Paul City Ry. Co. (Minn.), 5 R. R. R. 698, 28 Am. & Eng. R. Cas., N. S., 698 (duty of motorman to lookout for children at crossings); Heinze v. Metropolitan St. Ry. Co. (Mo.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107 (instruction was erroneous for imposing duty on conductor as well as motorman); Forrestal v. Milwaukee, etc., Co. (Wis.), 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814; Shariston v. Augusta, etc., Co. (S. Car.), 17 R. R. R. 190, 40 Am. & Eng. R. Cas., N. S., 190 (care required of motorman); Thompson v. Missouri, etc., R. Co. (Mo.), 2 R. R. R. 832, 25 Am. & Eng. R. Cas., N. S., 832 (duty to lookout for boy between cars blocking public street); Floyd v. Paducah, etc., Co. (Ky.), 8 R. R. R. 713, 31 Am. & Eng. R. Cas., N. S., 713 (duty to lookout for trespassers); McGanly v. St. Louis T. Co. (Mo.), 11 R. R. R. 247, 34 Am. & Eng. R. Cas., N. S., 247 (negligence was not shown, as matter of law, in not seeing vehicle on track); South Covington, etc., Co. v. McHugh (Ky.), 11 R. R. R. 760, 34 Am. & Eng. R. Cas., N. S., 760 (duty to other users of streets); Reno v. St. Louis, etc., Co. (Mo.), 11 R. R. R. 346, 34 Am. & Eng. R. Cas., N. S., 346 (insufficiency of evidence that motorman was chargeable with knowledge of pedestrians' peril); Gulf, etc., Ry. Co. v. Matthews (Tex.), 20 R. R. R. 573, 43 Am. & Eng. R. Cas., N. S., 573 (duty of motorman).

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Appeal from Circuit Court, Campbell County.
 "To be officially reported."

Action by Arrena Crutcher against the South Covington & Cincinnati Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

L. J. Crawford, for appellant.

A. M. Caldwell, for appellee.

CLAY, C. Appellee, Arrena Crutcher, instituted this action against the South Covington & Cincinnati Street Railway Company to recover damages for personal injuries. The jury returned a verdict in her favor for \$200. From the judgment based thereon this appeal is prosecuted.

The accident occurred at the intersection of Pearl and Pike streets, in Cincinnati, Ohio, on May 20, 1908. Pearl street runs east and west, and Pike street begins on the north side of Pearl and runs a short distance up a rather steep hill. As the street car reached the middle of Pike street, it came in contact with an ice wagon coming down that street. The tongue of the wagon passed through one of the windows of the car and injured appellee. Her account of the accident is as follows: "I got on board of the car there, and went over, and, when we came to Pearl and Pike, there this accident occurred. An ice wagon came down the street. They were going, of course, I suppose at a pretty good rate of speed. I couldn't exactly state the speed at the time that the car was traveling; but I saw the wagon coming, and I thought in all probability there was danger. So I waited a few minutes. I seen the other passengers get up, step to the opposite side of the car. I thought, well, there will be an accident. I will rose up and step into the aisle. And I was sitting with my right side against the window. When I raised partially up, just as I raised the crash came, and the tongue of the wagon came through the window and caught me, when I was only about halfway raised, over my right shoulder, and, of course, as they fell down, it throwed me forward on to the back of the seat in front of me, and the tongue dragged down over my back and right hip. Of course, it stunned me a little bit. And that was the way that accident occurred." Appellee further testified that she saw the wagon coming as she looked up Pike street, for she could see up that street a short distance before she reached the corner. She also testified as follows: "Well, the reason I thought so (that there would be an accident) was because the ice wagon was very near and coming very rapidly down the street. I didn't see as well as I could understand it how an accident could be avoided. I don't know, I thought that perhaps the car would pass swiftly enough over Pike street to escape a collision. Of course, I didn't have an idea whether it would

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hit the window or not; but I thought, well, I will get up and step to the other side of the car, as I saw the other passengers going that way over."

Thomas Lewis, another witness for appellee, testified substantially as follows: The grade on Pike street is very steep. When the car reached Pike street, the motorman did not do anything, but kept on coming pretty fast. If he had looked before crossing, there was nothing in the way to prevent him from seeing the wagon. When the wagon was within 10 feet of the car, the motorman rang his bell, and stopped the car. The car was stopped in the middle of the street. When it stopped, the wagon ran into it. This witness also made the following statement: "The reason I am satisfied he stopped it, because, if he hadn't stopped the car, I think there would have been more of an accident than what there was. I am satisfied the motorman stopped the car, but he stopped it with a sudden stop, all at once. If he had kept on, he would have avoided the accident."

Thomas Donahue, appellant's motorman, gave the following account of the accident: "Well, about the time before the accident, going west on Pearl street there was a big express wagon. Whether it came from the depot I don't know, but it was in the front of me, and, of course, he would not get out of the track, and he turned to go up Pike street. Well, of course, I was going slow at the time. I could not go fast because I was following him up. When he turned the corner of Pike street, of course, I gave her about half speed, and I happened to hear something. I could not see anything because this big black covered wagon was in the shade of the ice wagon. When I got just by there, I could see her coming, and, then this ice wagon was tearing down the street, it stunned me for a minute. I did not know which way to go or what to do or any thing else because I knew that I would get hit. He would get me anyhow, so I didn't know what to do. So I tried to make for the opposite side of the street, and I says, no, I cannot make it, he will get me anyhow. So I just waited; stood there thinking that he would slew his horses around, and go the other way; but he did not wheel the wagon because I was a little over halfway of the street, and I just had to stand there and take it. If he had slewed around the other way down Pearl street, he would have just taken the whole end of the car out, because the wagon would be turned around, slewed around, and taken the whole front end of the car off. So I tried to avoid it the best way I could, so I stopped. I think, if I had been going at the time when the accident occurred, it would have took and done more damage than what it did." This witness further testified that the driver of the wagon tried to go east. After the wagon which was in front of the car turned up Pike street, witness saw the ice wagon. He then put on half speed, and started across the street at the rate of five or six miles an hour. Just

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as he put on half speed the ice wagon was right on top of him. He then had no time to get out of the way. The wagon was coming like the fire department.

John Swis, the conductor, testified that he did not notice the ice wagon until it was within 10 feet of the car. So far as he knew, there was no wagon in front of the car. The ice wagon was coming down the street very rapidly.

Edward Riggs, a passenger on the car, testified as follows: "Well, as we came to the corner there, why, there seemed to be a wagon in front of the car. I remember the motorman ringing his gong. Right after that wagon had turned out, why, an ice wagon came down Pike, and the pole and the horse's head came in the side of the car, broke the side out, and scattered glass. I ducked my head down to get out of the way of the glass. The motorman seemed to be doing the best he could for to stop his car immediately. If he hadn't, we would all have been caught on that side of the car. The pole would have taken out the whole side of the car there."

Harry Evans, a passenger on the car, testified that when he saw the ice wagon it was 10 or 12 feet from the car; that the wagon was coming very rapidly. The motorman rang the gong several times and stopped the car. The ice wagon was going even faster than the fire department does sometimes.

John Adam Skinner, a passenger on the car, testified that just as they got to Pike street he saw the ice wagon dashing down that street, and before he knew it the tongue had crushed through the car. He thought the driver endeavored to turn his team to the east.

Two grounds are urged for reversal: First, the failure of the court to award appellant a peremptory instruction; second, contributory negligence on the part of appellee. We shall discuss the second contention first.

The evidence shows that appellee was 69 years of age. It is insisted that she was guilty of contributory negligence in getting up and going to the other side of the car. When her whole evidence is read, it is manifest that there was but a short period of time intervening between the time she saw the wagon and the time it came in contact with the car. Thus an emergency was presented. She was not placed in a perilous position by any act of hers. She had a right to make a choice as to the means to be used to avoid the peril. The making of an unwise choice under such circumstances does not constitute contributory negligence. *Louisville & Nashville R. R. Co. v. Molloy's Adm'x*, 107 S. W. 217, 32 Ky. Law Rep. 745. The only question in the case is whether or not a peremptory instruction should have gone in favor of the appellant. While one witness expressed the opinion that had the motorman proceeded across the street he would have avoided the accident, this witness does not state facts which tend to support

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this conclusion. When the car reached the middle of the street, the ice wagon was within 10 or 12 feet of it, and the circumstances all indicate that, had the car gone on, the ice wagon, instead of striking the car about the third window from the front, would have struck it near the center of the car, or towards the rear; and the impact would of necessity have been much greater, because both the wagon and the car would have been in motion. Thus it will be seen that there are no facts tending to show that the act of the motorman in stopping the car constituted negligence. It is mere speculation to say that had he gone on across the street he would have avoided the accident. All the circumstances tend to rebut this presumption. It is manifest that the only negligence on the part of the motorman, if there was any, consisted in his failing to observe the approach of the wagon, or in attempting to cross the street in the face of the danger likely to arise from coming in contact with the ice wagon. As a street car approaches a street crossing, it is the duty of the motorman to keep a lookout for persons or vehicles crossing or about to cross the track. In discharging this duty he is not required to stop and look up and down the street he is crossing. His primary duty is to look ahead, and to observe persons or vehicles approaching the track within the ordinary range of his vision while so looking. He has the right to presume that the driver of a vehicle approaching the track will have his horse or horses under control. Were he required to look up or down the street to avoid coming in contact with a runaway horse attached to a vehicle, a most uncommon occurrence, he might strike a vehicle or a person crossing the track, a very common occurrence, and thus injure such person or one of his passengers by his failure to keep a proper lookout. There is nothing in the evidence to show that the motorman saw the ice wagon until it was within 10 or 12 feet of the car. Nor is there any evidence tending to show that it was within the ordinary range of his vision as he looked ahead and started across the street. When the car stopped in the middle of the street, the wagon was then 10 or 12 feet distant. It was coming like the fire department; that is, at a very rapid rate. That being the case, the wagon must have been a considerable distance up the street when the motorman started the car across. It was not negligence, therefore, on his part to fail to observe the wagon when he could not see it and at the same time keep a proper lookout ahead.

For the reasons given, we conclude that the trial court erred in refusing to instruct the jury to find for appellant.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

CHESAPEAKE & O. R. CO. *v.* ROBINSON.

(Court of Appeals of Kentucky, Dec. 17, 1909.)

[123 S. W. Rep. 308.]

Carriers—Injury to Passenger—Contributory Negligence—Question for Jury.*—It is not negligence per se for a passenger to alight from a moving train.

Carriers—Injury to Passenger—Contributory Negligence—Question for Jury.—In an action for injuries to a passenger while alighting from a moving train at his station, evidence held to require the submission to the jury of the issue whether he exercised reasonable care in alighting, though the station was not announced.

Carriers—Carriage of Passengers—Announcement of Station.†—While a carrier must, as required by Ky. St. § 784 (Russell's St. § 5333), announce the station, it need not insure that a passenger hear it, provided the announcement is made in such a manner that the persons in the car having ordinary hearing and paying ordinary attention will hear it.

Carriers—Injury to Passenger—Stopping Train at Station.—A carrier must stop its trains at the stations a reasonable time for passengers to alight.

Carriers—Carriage of Passengers—Lighting Depot Platforms.‡—A carrier must have its depot platforms lighted so as to be reasonably safe for persons to board and alight from trains, but, where the trainmen are on the platform with their lanterns to furnish passengers light during the time the train stops, the carrier is not liable because they do not remain on the platform after the train starts.

Carriers—Injury to Passenger—Setting Down Passengers—Allowing Time to Alight.—Where a carrier failed to announce a station, as required by Ky. St. § 784 (Russell's St. § 5333), or failed to light its depot platform so as to afford a passenger a reasonably safe

*See extensive note, 32 R. R. R. 753, 55 Am. & Eng. R. Cas., N. S., 733; foot-note of *Sevier v. Southern Ry. Co.* (S. Car.), 32 R. R. R. 194, 55 Am. & Eng. R. Cas., N. S., 198.

†For the authorities in this series on the duty to announce that train is approaching station or other stopping place, see extensive note, 1 R. R. R. 904, 24 Am. & Eng. R. Cas., N. S., 904; *Tennessee Cent. R. Co. v. Brasher's Guardian* (Ky.), 21 R. R. R. 419, 44 Am. & Eng. R. Cas., N. S., 419 (carrier not excused for inducing passenger to leave train at wrong station by fact that conductor was honestly mistaken in making announcement thereof); *Brooks v. Philadelphia & R. Ry. Co.* (Pa.), 27 R. R. R. 683, 50 Am. & Eng. R. Cas., N. S., 683 (duty to announce station); *Southern Ry. Co. v. O'Bryan* (Ga.), 6 R. R. R. 59, 29 Am. & Eng. R. Cas., N. S., 59; *Southern Ry. Co. v. Hobbs* (Ga.), 9 R. R. R. 685, 32 Am. & Eng. R. Cas., N. S., 685; *Houston & T. C. Ry. Co. v. Goodyear* (Tex.), 2 R. R. R. 265, 25 Am. & Eng. R. Cas., N. S., 265.

‡See last foot-note of *Wagner v. Atlantic Coast Line R. Co.* (N. Car.), 28 R. R. R. 735, 51 Am. & Eng. R. Cas., N. S., 735.

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place to alight, and the passenger by reason of the failure to announce the station was delayed in alighting from the train, so that, when he undertook to alight, the train started suddenly when he was stepping from it, and he was injured, the carrier was liable; but, where the carrier called the station and stopped the train a reasonable time for passengers to alight, and the passenger failed to alight during that time and until after the train started, it was not liable.

Carriers—Injury to Passenger—Care Required of Passenger.§—Though a carrier is negligent in failing to announce the station or to have its depot platform lighted, a passenger must exercise such care as a person of ordinary prudence under similar circumstances will usually exercise, and, where he fails to do so and is injured, he cannot recover.

Appeal from Circuit Court, Floyd County.
"To be officially reported."

Action by William Robinson against the Chesapeake & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Walter S. Harkins, Worthing, Cochran & Browning, F. D. Wallace, and Joseph D. Harkins, for appellant.

May & May, for appellee.

HOBSON, J. William Robinson was a passenger on a train of the Chesapeake & Ohio Railroad Company from Catlettsburg to Prestonsburg. In getting off the train at Prestonsburg, he fell upon the platform as the train was pulling out, and his foot was caught under the wheel and crushed. He brought this action to recover for his injury, and a judgment having been rendered in his favor upon a verdict of the jury, assessing the damages at \$1,500, the railway company appeals.

The train reached Prestonsburg about 8 p. m. It was a dark rainy evening. The testimony of Robinson is to the effect that no notice was given of the arrival of the train at the station, and that, while the train was standing there, he learned it was at Prestonsburg, and immediately got up and went out to get off; that, as he was getting off, the train gave a jerk which caused him to fall, and his foot was caught and injured. He also testified that there was no light on the platform, that it was dark, and there was only a light in the station window. The testimony for the railroad company was, in effect, that the station was

§For the authorities in this series on the subject of the care required to be exercised by a passenger for his own safety, see last paragraph of second foot-note of *McLean v. Atlantic Coast Line R. Co.* (S. Car.), 30 R. R. R. 76, 53 Am. & Eng. R. Cas., N. S., 76; first foot-note of *Cleveland, etc., R. Co. v. Hadley (Ind.)*, 29 R. R. R. 10, 52 Am. & Eng. R. Cas., N. S., 10.

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properly called out; that there were some 20 odd passengers for that station who got off when the train stopped; that the train stood there from 5 to 7 minutes; and, after the passengers had all gotten off, the conductor went to the baggage car to look after the unloading of some baggage, and, when it was off, ordered the train forward; that after the train had started Robinson and his companion, Sizemore, came out on the platform without the knowledge of the conductor or any of the trainmen. As to what then occurred, one of the witnesses for the railroad company whose testimony was supported by other witnesses for the defense testified as follows: "While standing on the rear end of my coach, I observed two men coming forward from the coach behind, and, on approaching the front end of their coach, one argued that it was the town of Prestonsburg, and the other claimed it wasn't, and at the same time the one that claimed it was Prestonsburg said: 'I am going to get off.' Q. Then what happened? A. By that time the train had started to move very slowly, and one of the men went down the steps and jumped off backwards. He fell and rolled on the platform of the station. I leaned forward, and saw some one pull him away from the train. Q. What did the other man do? A. He started down the steps immediately after the first man had jumped, and also jumped off backward. He rolled along the platform of the station, and his legs were extended over the track." The first man who jumped off was Sizemore, and he escaped without injury. Robinson was the second man who jumped off after Sizemore. The defendant's testimony also showed that Robinson had two gallon jugs of whisky, also a quart of whisky, and that he had taken four drinks as he came along on the train. He and Sizemore were more or less under the influence of whisky. On this evidence the court gave the jury the following instructions:

"(1) If the jury believe and find from the evidence that the plaintiff, William Robinson, was a passenger aboard the defendant's train, and had paid for a first-class fare from Catlettsburg, Ky., to Prestonsburg, Ky., and that the defendant, Chesapeake & Ohio Railroad Company, by its agents, servants, and employees in charge of the train, at the time of the injury complained of, failed to call Prestonsburg station in the car in which plaintiff was riding within a reasonable time before its arrival at Prestonsburg station, from which calling plaintiff was notified it was to stop, and if the jury further believe and find from the evidence that the defendant, Chesapeake & Ohio Railroad Company, failed and neglected to light its station grounds and platform in such a manner as to afford plaintiff reasonably safe means of alighting from the train, and departing therefrom, and that the plaintiff by reason of such failure or neglect to so call said station, or light its station and platform, the plaintiff was delayed in getting off the train, and while attempting to get off the car started,

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thereby causing plaintiff to jump off the car, and in so doing was caught and injured as complained of, then you will find for the plaintiff such damage as you may believe from the evidence he has sustained, if any, not exceeding the sum claimed in the petition, \$1,900.

"(2) The court instructs the jury that if they should believe and find from the evidence that the plaintiff in attempting to alight from the train did so while the same was moving, and that in consequence thereof he was thrown down and injured, the law is for the defendant, and the jury will find for it."

It is manifest that the verdict of the jury is not warranted by the evidence under the instructions of the court; for the evidence leaves no doubt that the train was in motion before Sizemore jumped off, and Robinson's own testimony shows that he was jerked by the motion of the train, while he was yet standing on the platform of the car. It is earnestly insisted for the defendant that the court should have instructed the jury *peremptorily* to find for it. This would be correct under the evidence if the rule obtained in this state that it is *per se* negligence in a passenger to step from a moving train, but this court has steadily refused to adopt this rule, holding that it is a question for the jury whether the passenger in getting off as he did exercised ordinary care; for in many cases when a train is apparently moving very slowly it may reasonably appear to a prudent person safe to step from it. In view of our previous decisions and the evidence that the station was not announced, we have reached the conclusion that under the *scintilla* rule this case should go to the jury on the question whether Robinson, if the station was not announced, exercised reasonable care in getting off as he did. It is true that Sizemore had fallen, but it may be he did not know this when he stepped off, or he may have thought that Sizemore's fall was due to some other cause than danger in getting off. L. & N. R. R. Co. v. Eakins, 103 Ky. 472, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; I. C. R. R. Co. v. Whittaker, 57 S. W. 465, 22 Ky. Law Rep. 395; I. C. R. R. Co. v. Glover, 71 S. W. 630; L. & N. R. R. Co. v. Arnold, 102 S. W. 322, 31 Ky. Law Rep. 414. The instructions of the court are erroneous, in that they required no sort of care on the part of the plaintiff. Although the defendant was negligent, the plaintiff could not negligently jump off the train, and hold it responsible for his injury. The defendant was required to call the station in the car in which the plaintiff was riding; but it was not required to insure that the plaintiff heard the call. These words should have been omitted from the first instruction: "From which calling plaintiff was notified it was to stop." The plaintiff's injury was not due to a lack of light about the station grounds, and only the failure to light the platform should have been set out in the instruction. It was the duty of the railway company to announce the station and to stop the

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train a reasonable time for passengers to get off. It was also its duty to have its platform lighted so as to be reasonably safe for persons to get on and off the train while the train was at the station; but, when the trainmen were on the platform with their lanterns to furnish the passengers light to get off during the time the train stopped for this purpose, the company is not liable because they did not remain on the platform with their lanterns after the train started. The statute requires the station to be called in the car twice. Ky. St. § 784 (Russell's St. § 5333). There was no controversy as to Robinson's being a passenger on the train or as to his having paid his fare, or as to the fact that the train had stopped at the station from five to seven minutes before Robinson got off. In lieu of instruction 1, the court should have told the jury that if they believed from the evidence that the defendant's agents in charge of the train in question failed to announce twice Prestonsburg station in the car in which plaintiff was riding within a reasonable time before its arrival at that station, or that the defendant failed to light its platform in such a manner as to afford the passengers a reasonably safe means of alighting from the train while the train stopped for that purpose, and that the plaintiff, by reason of such failure to announce the station, was delayed in getting off the train, and, when he undertook to get off, the train started suddenly as he was stepping from it, and he received the injury sued for by reason of the failure to announce the station or to have the platform lighted while the train stood at the platform for the purpose of receiving or letting off passengers, the jury should find for him the damages he thereby sustained, unless they find as set out in No. 3. By another instruction the court, in lieu of instruction 2, should have told the jury that if the defendant called the station twice in the car in which plaintiff was riding as set out in No. 1, and stopped the train at Prestonsburg a reasonable time for passengers to alight therefrom, and the plaintiff failed to get off during this time and until after the train had started, he could not recover. By a third instruction the court should have told the jury that, although the defendant was negligent as set out in No. 1, still it was incumbent on the plaintiff to exercise such care for his own safety as a sober person of ordinary prudence, situated as he was, would usually exercise, under like circumstances, and that if he failed to do so, and but for this would not have been injured, the jury should find for the defendant. By a fourth instruction the court should have told the jury that the announcing of the station should be made in such a manner that the persons in the car having ordinary hearing and paying ordinary attention would hear it. These instructions with one defining the measure of damages cover the law of the case.

Judgment reversed, and cause remanded for a new trial.

JOHNS v. GEORGIA RY. ELECTRIC CO.

(Supreme Court of Georgia, Nov. 20, 1909.)

[66 S. E. Rep. 269.]

Carriers—Injury to Passenger—Nonsuit.—A woman having full knowledge that a street railway company had torn up a strip of pavement running along its track in a city street, and extending on each side of her residence for more than a block, for the purpose of laying an additional track, and of the consequent depression or hole in the pavement two or three feet wide, caused the conductor of a car on which she was riding to stop it in front of her home, in the middle of a block, at a place where cars would stop for passengers; and in the daytime, in full view of the situation, and without any compulsion, urging, or emergency, she voluntarily attempted to step from the car across such opening to the pavement on the other side of it, and in doing so stepped on a paving stone or dirt, which gave way, and she fell and was injured. Held, that she showed no right to recover against the company, and a nonsuit was proper.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton. Judge.

Action by Josie Johns against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. Josie Johns brought suit against the Georgia Railway & Electric Company to recover damages for a personal injury received from falling into a hole while alighting from a street car. On the trial the evidence introduced by the plaintiff was, in brief, as follows: She lived near the middle of a long block, and there was a point opposite the lot on which she lived where the street cars would stop for passengers to get on and off. The company was preparing to put down a double track along the street, and for that purpose had taken up the blocks forming the pavement along a strip next to the track, leaving part of the pavement next to the sidewalk. The dirt was also being levelled so as to provide for the shifting of the old track and the laying of the new one. Thus next to the track was a lower place or "hole" as the plaintiff termed it, which extended along the street for a block and a half on one side of plaintiff's residence and two blocks on the other side. As to the depth of the place so left open, the plaintiff gave no very accurate estimate, except to say that it was very deep, and that it was a big step or jump from the step of the car. She illustrated the distance, but what the illustration showed does not appear from the testimony brought up. The distance from the car across the remaining

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Belgian blocks she described as "as just a good step." Another witness estimated the distance from the top of the pavement to the bottom of the excavation at 15 inches, the distance from the step of the car to the Belgian blocks at about 18 inches, and the width of the hole or opening in the pavement, measured from the rail, at $2\frac{1}{2}$ or 3 feet. Where the blocks were taken up, it would leave the ends of others jutting out. The work was being done in front of where the plaintiff lived. She had seen it going on all the time. On the day of the injury in the afternoon she boarded a car at the place of stopping in the center of the block, and saw the opening in the street and the piling of the rocks. On her return trip, late in the afternoon, accompanied by her daughter, as the car on which she was riding approached her residence, she signaled the conductor to stop at the middle of the block, which he did, at the same place where the car had stopped before, or within a car length of it. She admitted having seen the width of the opening when she boarded the car, but said it seemed wider where she got off. When the car stopped, she started toward the rear platform, but the conductor, who was inside the car, told her to go to the front to get off. Opposite the rear platform was a pile of rocks. She and her daughter went to the forward platform; the latter preceding and the plaintiff closely following. The daughter caught hold of the iron rod of the car and let herself down, stepping into the bottom of the hole or opening in the pavement, and then stepping out on the side next to the sidewalk. The plaintiff was standing in the door, and saw her daughter leave the car. She then followed, but undertook to step across from the car to the Belgian blocks which had not been removed, because, as she testified, she could not jump down in the hole. The rock or dirt on which she stepped gave way, and she fell and was injured. It was in the daytime, and the whole situation was plainly visible, except that she did not know that the place where she stepped would give way. There was also evidence as to the extent of the injury. At the close of the plaintiff's evidence, on motion the court granted a nonsuit, and the plaintiff excepted.

Reuben R. Arnold and Harvey Hill, for plaintiff in error.

Rosser & Brandon and Colquitt & Conyers, for defendant in error.

LUMPKIN, J. (after stating the facts as above). With full knowledge of the physical condition of the street in front of her house, the plaintiff voluntarily caused the conductor of the street car to stop it there in order that she might alight. The place of stopping was not his selection. It was hers. There was no emergency compelling her to get off there, except a desire to avoid walking a block or two, if she should get off where those conditions did not exist. The conductor did not command her

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to leave the car, or inform her that it was safe to do so. When she started toward the rear platform, beside which paving stones were piled along the street, he told her to go to the front. This was rather a warning than a command to leave the car. It was in the daytime, and the situation was plainly visible. Her daughter immediately preceded her, and alighted in safety by stepping down into the depression or "hole" caused by the removal of the paving stones from a strip of the street alongside the track for the purpose of building an additional track, and then stepping up on the pavement on the other side. There was no contention that the plaintiff did not see the entire condition of affairs. On the contrary, she evidently did so, and she testified that she could not step down into the opening and attempted to step across it, a distance which she described as a somewhat long step. The conductor, who was inside the car, had nothing to do with this decision or the effort to carry it out. When she attempted to step from the car across the opening in the pavement, she placed her foot on a paving stone or dirt, which gave way and she was hurt. She took the chance of being able to make the long step successfully, and she failed to do so in safety. Even if the defendant was not altogether faultless, nevertheless she cannot recover for the results of her own conduct with full knowledge and in full view of the situation. Her injury was unfortunate, but she has no right to recover from the defendant. This case is not like those involving concealed dangers or dangerous places known to the company, and not to the passenger, or where a passenger was ordered or forced to leave a car, or where there was a defect in a street or sidewalk, which may have been previously known to a passer, but of the proximity or danger of which, by reason of darkness or other cause at the time of the injury, he was not aware.

It is more like the case of *Sheats v. City of Rome*, 92 Ga. 535, 17 S. E. 922, where, although a city was negligent, after causing a ditch to be dug across a sidewalk, in leaving it open, a woman, who was aware of its existence, width and depth, and who undertook to jump across it, or stepped into it on a rock and tried to step out, and was thus injured, was held to have no right to recover. In the case before us the plaintiff was aware at the time of leaving the car of the condition of the street. The distinction between the two classes of cases is referred to in *Macon Ry. Co. v. Vining*, 120 Ga. 511, 513, 48 S. E. 232. See, also, *Blodgett v. Bartlett*, 50 Ga. 353; *Barnett v. East Tenn. Va. & Ga. Ry. Co.*, 87 Ga. 766, 13 S. E. 904; *East & West R. Co. v. Waldrop*, 114 Ga. 289, 40 S. E. 268. The nonsuit was properly granted.

Judgment affirmed. All the Justices concur.

LOUISVILLE & N. R. CO. v. STREET.

(Supreme Court of Alabama, Dec. 16, 1909. On Rehearing, 1910.)

[51 So. Rep. 306.]

Appeal and Error—Review—Punitive Damages—Wrongful Death.—Code 1907, § 2486, giving a personal representative an action for such damages as the jury may assess for wrongful death, if decedent could have maintained an action for such wrongful act, had it not caused death, provides for a recovery of punitive damages only; the amount resting in the discretion of the jury, whose verdict will not be reviewed for inadequacy.

Damages—Punitive Damages.—A person is without legal right to punitive damages, as that right attaches to actual damages suffered, and they may be affirmatively withheld by the Legislature so far as impinging rights of property are concerned.

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by Barbara Street, administratrix, against the Louisville & Nashville Railroad Company. Judgment for plaintiff for nominal damages. From an order granting a new trial, defendant appeals. Reversed and rendered.

Tillman, Grubb, Bradley & Morrow, for appellant.

Gaston & Pettus, for appellee.

MCCLELLAN, J. This appeal, from an order granting a new trial of an action possible, alone, by virtue of the provisions of the homicide act (Code 1907, § 2486), and in which the jury awarded one cent damages, presents the inquiry whether a trial court may review and revise the amount of the jury's verdict, where, under the cited statute, the damages are punitive purely, and the amount to be assessed is left to the discretion of the jury—such damages "as the jury may assess." This statute has become fixed in this construction and effect, viz., that the recovery provided is punitive only. *R. & D. R. R. Co. v. Freeman*, 97 Ala. 289, 11 South. 800, among others cited in the annotations to the statute. Being of that class of damages, the plaintiff is without legal right to them, as that right attaches to actual damages suffered. *Comer v. Age-Herald Pub. Co.*, 151 Ala. 613, 44 South. 673, 13 L. R. A. (N. S.) 525. Such damages may be even forbidden, or affirmatively withheld, by legislative enactment, so far as impinging rights of property are concerned. In short, such damages, until a vested property right attaches to them through a judgment rendered in a party's favor, are not properly within the protection of Constitutions.

The chief argument in support of the right of review and re-

vision here undertaken, on the ground of inadequacy of the sum assessed in this verdict, is that the right of review and revision of verdicts on the ground of excessiveness is universally admitted, and, proceeding from this as a premise, counsel for appellee put their argument in its strongest possible form when they say: "It is a poor rule that will not work both ways." At first blush, the argument appears sound, and to conclude to impartiality and fairness. But maturer consideration discovers its vice. That vice lies in the assumption that the right of the defendant, who complains against an excessive verdict for punitive damages, is the like and same character of right of a plaintiff who sought only to recover punitive damages. As to the former, the defendant, to discharge the judgment, to follow the verdict, must respond in a sum in excess of that a proper exercise of the discretion would have fixed as punitive; in the latter, the plaintiff's complaint involves no property to which he is, through the equivalent in damages, entitled. In the former, an obligation, a liability, is fixed; in the latter, the beneficiary is such, alone, because the statute intends, primarily, the punishment of the offender whose wrongfulness has taken human life. In the former, the estate of the wrongdoer is diminished; in the latter, the sum recovered is not an asset of the decedent's estate, not subject to his debts or liabilities, and so notwithstanding the sum recovered is distributable in accordance with our statutes of distribution.

The case, then, is one where the amount of the damages (purely punitive) is left to the discretion of the jury. The exercise of this discretion by the jury has never been, so far as we are advised, the subject of review and revision by trial courts, even where actual damages were shown and recoverable. Of course, our books abound in cases where this court reviewed the action of trial courts instructing juries that punitive damages might or might not be awarded by the jury in the given case. But this is an entirely different matter from revising the jury's judgment merely in the sum assessed, upon the ground of inadequacy. The statute commits the ascertainment of the amount to the jury's discretion. In dealing with new trials, granted or refused, on the ground of excessiveness of punitive damages stated in the verdict, the test has been often found in the inquiry, whether the verdict was the result of passion, prejudice or oppression. If so, an order for new trial should be entered. No such cause could affect the alleged inadequateness of the punitive damages assessed, for the reason that no right of the movant, aside from the right that the jury ascertain, in their discretion, the sum to be assessed as a punishment, was subject to the influence of adverse passion or prejudice, or was the result of a desire to oppress. Appellee's counsel cite a number of decisions of this court in support of the proposition that the power of review and revision,

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on the ground of the inadequacy of the damages assessed in the verdict, exists at *nisi prius*. There can be no doubt of the soundness of that proposition when actual damages are inadequately assessed. Of this school of cases may be noted *Hardeman v. William*, 157 Ala. 422, 48 South. 108, where trespass to real and personal property was the basis of recoverable damages, and one cent was awarded. It is not held, in that case, that the sum assessed was inadequate, because the jury should have, in their discretion, awarded punitive damages; much less that, if such damages were awarded, the sum could be revised in the trial court or elsewhere.

We think the principle, followed to its legitimate effect and result, forbids the review and revision of a verdict, given in an action under the homicide statute, on the sole ground of the inadequacy of the sum assessed, that could only be, and was, we must assume, so assessed, as the jury's idea of the punishment due the wrongdoer. Of course, and perhaps it is unnecessary to state it, we have dealt only with the right of revision of verdicts in respect of punitive damages, and have not assumed to treat or doubt the inherent right of trial courts to purge their records of verdicts rendered by juries guilty of misconduct usually avoiding the conclusion set forth in the verdicts. The order granting the new trial is reversed, and judgment will be here entered overruling the motion for a new trial.

Reversed and rendered.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

On Rehearing.

PER CURIAM. In asserted support of the application for rehearing, in respect of the question decided, counsel for movant cite the following texts and decisions: 4 Suth. on Dam. § 1263; *Mobile Fur. Co. v. Little*, 108 Ala. 399, 19 South. 433; 14 Ency. Pl. & Pr. p. 760; *Benton v. Collins*, 125 N. C. 93, 34 S. E. 242, 47 L. R. A. 33; *Phillips v. Railway Co.*, Q. B. Div. Law Records (1878-79); *Lee v. Knapp*, 137 Mo. 385, 38 S. W. 1107; *Chouquette v. Sou. R. R. Co.*, 152 Mo. 257, 53 S. W. 897; Suth. on Dam. § 459; *Henderson v. St. Paul R. R. Co.*, 52 Minn. 483, 55 N. W. 53; *Watson's Dam. for Personal Injuries*, p. 884; *Joyce on Dam.* §§ 59, 552-562; 2 Suth. on Dam. § 393. None of these texts or decisions immediately bear upon the concrete question presented on this appeal, namely, whether a trial court may review and revise the amount of the jury's assessment of purely punitive damages, committed for ascertainment to the jury's discretion, on the sole ground of the inadequacy of the sum so assessed. And it may be added that in every decision cited for movant, where a new trial was sought or granted, compensatory damages were involved, or the effort, inviting appellate consideration, was to avoid the verdict because excessive in amount.

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Mobile Furniture Co. v. Little, *supra*, a suit on garnishment bond, had to deal with, as here pertinent, a charge wherein it was said that the burden was on plaintiff to furnish data from which the jury could ascertain with reasonable certainty the amount of the actual and exemplary damages. To this question, speaking through Haralson, J., the court responded: "Vindictive damages are allowed to be imposed by way of punishment, are at the discretion of the jury, within reasonable limits. It was not incumbent on plaintiff to furnish the data for them to ascertain with reasonable certainty, the amount of such damages." This decision is without bearing on the question here. The statement, "within reasonable limits," obviously had reference to the maximum, and not to the minimum, sum assessable by the jury as exemplary damages.

In the brief this quotation from Watson's excellent work on Damages (*supra*) is set down: "But the amount of such [punitive] damages is not within the arbitrary or capricious discretion of the jury; it should be reasonably adequate to the degree of fault." The last phrase of the quotation was a credited appropriation, by the learned author, from L. & N. R. Co. v. Minogue, 90 Ky. 369, 374, 14 S. W. 357, 29 Am. St. Rep. 378. Appellee was a passenger on one of appellant's trains, and was injured as the result of a collision between that and another train. The jury returned a verdict for \$10,000 in favor of the appellee, and the defendant (appellant) insisted that the sum assessed was excessive. The court ruled against appellant's stated insistence. The court, in dealing with this question of excessiveness of the verdict, used the language quoted by Mr. Watson. It is obvious that the Kentucky court was not invited, nor did it assume, to announce the recognition of the power of review and revision of verdicts for punitive damages, only, on the sole ground that the sum assessed by the jury, in its discretion, is inadequate.

The several texts cited in briefs announce general and familiar rules, but no writer, text or judicial (and investigation here has been exhaustive), has stated or approved the doctrine on which movant must rely on this occasion.

The rehearing is denied.

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STRUBLE *v.* PENNSYLVANIA CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 17.]

Carriers—Injuries to Passengers—Contributory Negligence.*—The rule requiring that one crossing a railroad over a highway should stop, look, and listen is not to be rigorously applied to a passenger at a station going to or from his train.

Carriers—Injuries to Passengers—Contributory Negligence.†—A passenger awaiting his train at a station has a right to assume that the railroad company will exercise the strictest vigilance to protect him from injury, either by the train he intends to take, or one passing through the station before it arrives.

Carriers—Injury to Passenger at Station—Contributory Negligence.*—Where a passenger at a station in crossing an intervening track to take his train is struck by the locomotive of the train which he intends to take, the question of his contributory negligence is for the jury.

Appeal from Court of Common Pleas, Mercer County.

Action by Julia A. Struble against the Pennsylvania Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

S. R. Mason, for appellant.

S. H. Miller and *Q. A. Gordon*, for appellee.

BROWN, J. On the afternoon of November 15, 1905, the husband of the appellee—77 years of age—purchased from the defendant company, at its ticket office in Sharon, a ticket to Clarks-ville. The train he was to take was coming from the south on the north-bound track, which was opposite the station. It fronted on the south-bound track. After purchasing his ticket the deceased remained in the waiting room with other passengers until the ticket agent notified them to cross over to the platform and

*See sixth foot-note of *Dieckmann v. Chicago, etc., R. Co. (Iowa)*, 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346; fourth head-note of *Chicago, etc., R. Co. v. Stepp (C. C. A.)*, 32 R. R. R. 207, 55 Am. & Eng. R. Cas., N. S., 207.

†For the authorities in this series on the subject of the right of a passenger to rely on the assumption that the carrier has performed, or will perform, its duties to him, see fourth foot-note of *Dieckmann v. Chicago, etc., R. Co. (Iowa)*, 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346; second head-note of *Cincinnati Traction Co. v. Leach (C. C. A.)*, 32 R. R. R. 193, 55 Am. & Eng. R. Cas., N. S., 193; third foot-note of *Rearden v. St. Louis, etc., R. Co. (Mo.)*, 31 R. R. R. 429, 54 Am. & Eng. R. Cas., N. S., 429; fourth head-note of *Lockwood v. Boston Elec. R. Co. (Mass.)*, 31 R. R. R. 395, 54 Am. & Eng. R. Cas., N. S., 395.

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take the train which was approaching from the south. It was composed of vestibule cars, the doors of which were open for passengers only on the east side, and it was therefore necessary for them to cross over to the platform to enter the train. Other passengers passed safely over the north-bound track to the platform, but, as the deceased was about to cross the first or south-bound track, a locomotive passed over it to the south at a high rate of speed. He waited until it had passed, and, in attempting to cross over to the platform, was struck by the locomotive of the approaching train just as he put his foot upon the first rail of the north-bound track, and died within a short time from the injuries received. The testimony of the ticket agent is that when he notified the passengers to go over to the platform, they started to do so. A rule of the company required him to give the notice to cross over two or three minutes before the arrival of the train, and he stated that whenever he learned from the dispatcher that it had left South Sharon—a three minutes' run from his station—he would notify the passengers to cross over. He was not able to state what length of time elapsed between his notice to the passengers to cross over and the arrival of the train which struck the deceased, but it is quite clear that he had not given the three-minute notice required by the rule of the company, for his testimony was that it took but 15 seconds to cross over. Brief notice was given to the deceased that his train was approaching, and when he started to do what the agent of the company had directed him to do, the engine rapidly approaching from the north cut off his passage over the tracks, emitted steam and smoke, obstructed a view to the south, and made a noise which prevented his hearing the calls to him not to proceed. The negligence of the company was so clearly established that on this appeal its learned counsel does not question it, frankly stating that the sole question is whether the deceased was guilty of such contributory negligence as to prevent a recovery by the appellee.

Clear as was the negligence of the appellant, the deceased, through a passenger, was bound to exercise proper care under the circumstances, and, if it unmistakably appeared that he rushed in front of the approaching locomotive, which he saw, or was bound to see, taking the chance of passing safely over, the law would charge his death to his own rashness. But such penalty is not to be imposed upon those who have been injured by his death, unless the only possible conclusion to be reached from the evidence is that no ordinarily prudent man would have done what he did. Negligence, whether it be that charged to a defendant or to a plaintiff as a contributing cause to the injuries for which he sues, is absence of care according to the circumstances. The care required of one about to cross a railroad laid over a highway is fixed by the unbending rule requiring him to stop, look, and listen. This rule, however, for

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a good reason, is not to be rigorously applied to a passenger at a station going to or from his train. When at a station an intending passenger awaits his train, he has a right to assume that the railroad company will perform its duty of exercising the strictest vigilance to protect him from being injured, either by the train he intends to take, or by one passing through the station before it arrives. *Pennsylvania Railroad Co. v. White*, 88 Pa. 327; *Flanagan v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 181 Pa. 237, 37 Atl. 341; *Betts v. Lehigh Valley R. R. Co.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261; *Harper v. Pittsburg, Cincinnati, Chicago & St. Louis R. R. Co.*, 219 Pa. 368, 68 Atl. 831; *Besecker v. Delaware, Lackawanna & Western R. R. Co.*, 220 Pa. 507, 69 Atl. 1039, 123 Am. St. Rep. 714.

In view of the duty which the appellant owed the deceased, from the relation which it established to him as a passenger in selling him a ticket, to be almost immediately used, the court could not, under all the evidence, have pronounced him guilty of contributory negligence. That question was clearly for the jury, as abundantly appears from a mere recital of the undisputed facts. When notice was given by the defendant's agent to cross over to the east platform, the deceased, with other passengers, started to do so. While proceeding along the walk provided for the use of passengers in crossing from the station to the platform, and just as he reached the first or south-bound track, his progress was interrupted or delayed by a locomotive passing south on the south-bound track towards a water tower standing some distance down the track. This engine made more or less noise, and was emitting smoke and steam. As soon as it had passed the deceased proceeded on his way towards the eastern platform, had crossed the first or south-bound track, and just as he was about to step on the north-bound track, which was but eight feet from the track he had crossed, he was struck and killed. In addition to the foregoing undisputed facts there was evidence that the engine passing to the south emitted smoke and steam, obstructing the view of the incoming train, and that, in consequence of the noise made by the passing engine, the deceased was unable to hear the warning given him not to cross over. In attempting to cross over he was doing just what the agent had directed him to do. He had a right to assume that the notice given to cross over was sufficient to enable him to reach his train in safety, and the evidence tended to show he could have done so had his progress not been interrupted by the act of the defendant in running the engine down the south-bound track just at the time when the passengers were crossing over to the other side. While the jury might have found him guilty of contributory negligence in not exercising proper care under the circumstances, the fair inference drawn by them was that he was not, and we cannot therefore disturb it.

The assignment of error is overruled, and the judgment affirmed.

HERRIN & S. R. CO. v. NOLTE et al.

(Supreme Court of Illinois, Feb. 16, 1910.)

[90 N. E. Rep. 1097.]

Eminent Domain—Compensation—Measure and Amount.—Where land is taken by a railroad company for a right of way, the fact that the land will remain open and unfenced for six months may properly be considered in fixing the damage from the construction of the railroad to the land not taken.

Eminent Domain—Compensation—Instruction.—A requested instruction in condemnation proceedings, authorizing the jury viewing the premises to fix the amount of damages on their judgment formed from personal examination, even though it might differ from the amount testified to, and from the weight of the evidence given by the witnesses, was erroneous and properly refused.

Trial—Instructions—Support in Evidence.—In condemnation proceedings, where the petitioner's own witnesses testified that land not taken would be damaged, the court properly refused to instruct at its request that if the property not taken had been increased in value by the improvement, and this equaled or exceeded the injuries sustained, no damages should be allowed, although the charge stated a correct principle of law.

Trial—Compensation—Instructions—Credibility of Witnesses.—The testimony of every witness, not willfully false, is entitled to be weighed by the jury, and it was error in condemnation proceedings to charge that, if any witness had underestimated the value of the land taken or the damages to the land not taken on account of interest, prejudice, or want of knowledge, experience, or truthfulness, their testimony should be disregarded, in so far as it unjustly underestimated either the value of the land taken or the damages to the land not taken.

Eminent Domain—Harmless Error—Instructions.—In condemnation proceedings to acquire a railroad right of way, where there was no objection to the amount of damages awarded for the land taken, and the court is of the opinion that under the evidence and the circumstances of the case, the verdict for damages to the land not taken is as favorable as could be expected, it will affirm the judgment, although the trial court erred in instructing the jury.

Appeal from Williamson County Court; W. F. Slater, Judge.

Condemnation proceedings for a right of way by the Herrin & Southern Railroad Company against Henry Nolte and others. From a judgment on the verdict fixing the amount of damages, the petitioner appeals. Affirmed.

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Neely, Gallimore, Cook & Potter, for appellant.
Hartwell & White, for appellees.

CARTWRIGHT, J. Appellant located its railroad across two tracts of land constituting part of an improved farm owned by Henry Nolte, one of the appellees, in Williamson county, entering the first tract of $33\frac{1}{3}$ acres on the north side and running southeasterly across it, taking 1.26 acres of that tract, and, after crossing another tract, again entering the farm on the west side of a 40-acre tract, and running in the same direction across it, taking all of that tract west of a line 50 feet east of and parallel to the center line of the railroad, containing 1.60 acres. A petition was filed in the county court of said county to ascertain the compensation to be paid for the land so taken, and Henry Nolte and his tenants were made defendants. Henry Nolte, the owner of the farm, filed his cross petition, claiming damages to a large part of the farm by reason of the construction and operation of the railroad. The questions of compensation to be paid for the land taken and damages to land not taken were submitted to a jury, and the verdict fixed the amounts at \$165 for the land taken and \$840 for damages to land not taken. The court gave judgment on the verdict, and an appeal was prosecuted from that judgment.

The first complaint is that the court gave instruction No. 4 at the request of the defendant Henry Nolte. The jury were advised by the instructions that the measure of damages to land not taken was the depreciation in market value by the building and operation of the road, and this instruction authorized them, in estimating such damages, to consider the depreciation, if there was any, which would result to the land not taken by reason of the same remaining open, exposed, and unfenced for the space of six months. The argument against the instruction is that the statute requiring fences is designed to protect domestic animals and prevent their being killed or injured; that fences would be a protection to the general public as much as to the landowner; and that, inasmuch as domestic animals are forbidden by law to run at large in this state, the danger from killing stock was not proper to be considered. In a condemnation suit, damages resulting from injuries to stock for which the railroad company would be liable in another action, and possible dangers of stock being killed, where the market value of the land is not affected thereby, cannot be considered. But there was nothing in this instruction referring to killing stock or concerning the recovery of damages therefor. It is proper to take into consideration all those things which affect the market value of the land, and the fact that the premises will be kept open for six months unfenced is proper to be considered. The inconvenience of having a cultivated field or pasture land thrown open during the construction

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of a railway through the same, and for six months afterward, may be a material element of damage. Whatever the purpose of the statute may be, the fact that one side of a field will be unfenced for six months might materially interfere with its use and a person buying might pay less for it on that account. The court did not err in giving the instruction. *St. Louis, Jerseyville & Springfield Railroad Co. v. Kirby*, 104 Ill. 345; *Centralia & Chester Railroad Co. v. Rixman*, 121 Ill. 214, 12 N. E. 685; *Centralia & Chester Railroad Co. v. Brake*, 125 Ill. 393, 17 N. E. 820; *Chicago & Milwaukee Electric Railroad Co. v. Diver*, 213 Ill. 26, 72 N. E. 758.

The next complaint is that the court refused instruction No. 4 tendered by the petitioner. This instruction stated that, if the jury believed they had arrived at a more accurate judgment and determination as to the value of the premises sought to be taken and the amount of damages by their personal examination of the premises than was shown by the evidence in court, they might rightly fix the value of the land and amount of damages at the amount approved by their judgment so formed from personal examination, even though it might differ from the amount testified to and from the weight of the evidence given by the witnesses. It was a vicious instruction, and the court did not err in refusing to give it. An instruction less objectionable, but having the same tendency, was condemned as long ago as the case of *Peoria Gaslight & Coke Co. v. Peoria Terminal Railway Co.*, 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373. The instruction in that case authorized the jury to base their estimate upon their own inspection of the premises, if they concluded that such inspection furnished a more reliable basis for an assessment than the evidence of the witnesses, but told them that they had no right to arbitrarily or without reason reject any of the testimony. This instruction did not even contain that requirement, and similar instructions have been held bad in *Chicago & State Line Railway Co. v. Mines*, 221 Ill. 448, 77 N. E. 898, and *South Park Com'rs. v. Ayer*, 237 Ill. 211, 86 N. E. 704.

It is next argued that the court erred in refusing to give instruction No. 3 presented by the petitioner, which stated that, if the property not taken had been increased or enhanced in value by reason of the improvement and such increased value equaled or exceeded the injuries sustained, then under the law there was no damage, and none should be allowed for the land not taken. The instruction stated a correct rule of law, but must have been offered without any reference to the case on trial. The witnesses for the petitioner testified that the land not taken would be damaged, and they gave estimates of such damages, so that it would have been impossible for the jury, under the evidence introduced by the petitioner itself, to have found that there was no damage to the land not taken. The court did not

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err in refusing the instruction, which the jury could not have applied to the case.

The court gave an instruction (No. 11) at the instance of the defendant which ought not to have been given. It was an argument for the defendant, and advised the jury that if they believed any witness had underestimated the value of the land taken or the damages to land not taken, on account of interest, prejudice, or want of knowledge, experience, or truthfulness, they had the right to disregard the evidence of such witness in so far as the same was unjustly minified or unjustly underestimated, either as to the value of the land taken or damages to land not taken. The interest, prejudice, or want of knowledge, experience, or truthfulness of any witness for either party would be proper for consideration by the jury in weighing his testimony, and it would not be improper to give a cautionary instruction of that kind; but a court ought, when advising the jury on that subject, at least to apply the rules to witnesses on both sides. The instruction was not only bad in authorizing the jury to disregard the testimony of witnesses, but it was applied only to witnesses for the petitioner. The testimony of every witness, which is not willfully false as to a material matter and without corroboration, is entitled to consideration by the jury, and is to be weighed and considered.

Whether the judgment ought to be reversed on account of that instruction is to be considered in connection with the last point made in the argument—that the damages allowed were excessive. The verdict was low enough as to the land taken, and there is no claim that it was not. There were material and substantial damages to the remainder of the farm, which were estimated by two witnesses for petitioner at \$600, by two such witnesses at \$500, by one at \$400, and by one at \$200. The witnesses for the defendant estimated the damages at from \$1,000 to \$2,000. The petitioner filed stipulations that a farm crossing should be put in at a certain place, in compliance with the statute, and that it would grant to defendant Henry Nolte, owner of the farm, a perpetual right of way for a private road along the east line of the railroad right of way, 30 feet wide, over an adjoining tract of land, and that such road should be properly graded for team travel by the petitioner. There was a high fill or dump on the land, and the plans of construction filed did not show any trestle-work or opening in it, so that drainage would be interfered with, and the petitioner filed a stipulation that it would construct the road so as not to interfere with the drainage then existing under the tracks of the Illinois Central Railroad, which ran along the farm on the south, and that it would take care of and provide for all the proper drainage, so that the adjoining land would not be affected, in so far as drainage was concerned, in anywise different from the condition then existing. Assuming that these stipula-

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tions were authorized and binding on the petitioner, and considering the situation from every standpoint, we do not think a more favorable verdict could be expected. For that reason we are disposed to affirm the judgment, notwithstanding the error in giving the eleventh instruction.

The judgment is affirmed.

Judgment affirmed.

STATE v. NORFOLK & S. RY. CO. *et al.*

(Supreme Court of North Carolina, Feb. 25, 1910.)

[67 S. E. Rep. 42.]

Corporations—Criminal Offenses—Indictment—Notice.—The proper mode of bringing into court a corporation charged with crime is by the issuance of a notice against it, and the service thereof on an agent.

Corporations—Criminal Responsibility.—A corporation, in the hands of a receiver appointed by a federal court, is not criminally liable for the acts of the agents of the receiver, obstructing a public road contrary to a state statute.

Receivers—"Receiver" as Officer of Court.—A "receiver" is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, and he holds the property for the benefit of all the parties interested, and his title and possession is that of the court.

Railroads—Operation—Criminal Responsibility—Receiver.*—Receivers in full charge of a railroad, which they, through servants operate, are indictable, at least individually, for the obstruction of a public road by leaving cars therein in violation of a statute.

Appeal from Superior Court, Washington County; Ward, Judge.

The Norfolk & Southern Railway Company, by its receivers, was convicted of obstructing a public road, and it appeals. Reversed.

Gaylord & Gaylord, for appellants.

Attorney General Bickett, for the State.

WALKER, J. This is an indictment against the Norfolk & Southern Railway Company and H. M. Kerr and Harry Woolcott, receivers thereof, appointed by the federal court, for obstructing

*For the authorities in this series on the subject of the liability of the receivers of a railroad on account of torts committed during the receivership, see foot-note of *Tobin v. Central Vermont Ry. Co.* (Mass.), 11 R. R. R. 196, 34 Am. & Eng. R. Cas., N. S., 196.

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a public highway in Washington county. The obstruction consisted in leaving cars in the public road, contrary to the statute of this state. A summons was issued to the defendants, requiring them to appear at the October term, 1909, of the superior court of said county and plead to the bill. This summons was returned by the sheriff as having been served upon W. J. Nicholson, local agent for the receivers, but there was no service of the notice upon the agents of the defendant corporation, and upon this ground, a motion was made at the October term to quash the bill. The solicitor sent another indictment against the railroad company, which was returned a true bill by the grand jury, and the trial of the case proceeded upon both bills; the second bill being treated as an additional count, or the two indictments as separate counts of the same bill. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384; and *State v. Railroad*, 125 N. C. 666, 34 N. E. 527. See, also, *State v. Johnson*, 50 N. C. 221; *State v. McNeill*, 93 N. C. 552; *State v. Lee*, 114 N. C. 844, 19 S. E. 375. The defendant entered a special appearance, and objected to being tried on the new bill, on the alleged ground that no notice had been issued and served upon it, and for that reason it was not properly before the court; but it appears from the record that a notice was issued, both against the corporation and the receivers. This was the proper way to bring the corporation into court to answer the indictment. *State v. R. R. Co.*, 89 N. C. 584. It does not appear clearly in the record that this notice was served upon any agent of the corporation, as such, but only upon the agent of the receivers, but it is not necessary for us to discuss whether the corporation was properly brought into court, as it is our opinion that it was not, under the facts and circumstances of this case, liable to be indicted for the alleged nuisance. This court has held that service on the receivers of a corporation in a civil suit is service against the corporation itself. *Farris v. Railroad*, 115 N. C. 600, 20 S. E. 167. Whether, if the corporation had been liable to an indictment for the nuisance, this was a sufficient service to bring them into court for the purpose of answering or pleading to the indictment is a question not necessarily before us. The court overruled the motion of the railway company to quash the bill, for the reason just assigned, and the defendant excepted.

The state introduced evidence tending to establish the nuisance. The defendants offered no testimony. The receivers, Kerr and Woolcott, moved the court to quash the indictment as to them, which motion was allowed. The Attorney General admitted in this court, orally and also in his able and learned brief, that the court erred in discharging the receivers, and wittily remarked that "The court had the sow by both ears, and needlessly turned loose one. Had the court turned loose the wrong one?" This, he says is the point raised by the several motions and exceptions of the railway company. The Attorney General then

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admits that the authorities are against the state upon this question. In Bishop's new Criminal Law (a work of great merit) at page 257, §§ 421, 422, it is said: "If the affairs of a railway corporation are under the sole management of a receiver, over whose acts it has no control, it is not liable to a criminal prosecution for the nuisance of obstructing a highway, by stopping thereon its trains, because, said Bennett, J., 'No man or corporation should be made criminally responsible for acts which he has no power to prevent.'" It is stated in 24 Am. & Eng. Enc. of Law, at page 12, that where a corporation is in the hands of a receiver, who has full possession of its property and entire charge of its affairs, the corporation cannot be prosecuted for crimes and misdemeanors committed by the agents or servants of the receiver. See, also, *Railroad Co. v. Com.* (Ky.) 33 S. W. 822; *State v. Railroad Co.*, 88 Iowa, 689, 56 N. W. 400; *State v. Railroad Co.*, 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179; *State v. Railroad*, 30 Vt. 108. In all of the cases just cited it is held that a corporation cannot be convicted for crimes committed by the agents and employees of its receivers, and the decisions are based upon the ground that, as a corporation can do no act which will be an interference with the operation of the road, or the proper discharge of the duties committed to the receivers, while they are in full control, it consequently can commit no criminal offense through those who act only for the receivers. We think it would be manifestly unjust, and contrary to every elementary and settled principle of the criminal law, to hold a natural person or a corporation liable for an act which, according to the laws of the state where it is committed, is criminal, when the corporation or individual did not have the power to commit the act, and which act was committed by receivers who, by the appointment and authority of the court, had temporary charge of the assets of the individual or corporation when the act was committed. It would shock every man's sense of justice to lay down such a principle, and it would make the innocent suffer for the wrongdoing of others over whom they had no power or control. The alleged nuisance was committed, if at all, in the operation of the railway company by the receivers, who were appointed by the federal court, and the corporation had no right, through its officers or agents, to interfere with the receivers in the discharge of their duties. Any such interference would have been a contempt of the court which appointed the receivers, and subjected the corporation to a fine. *Clark Corporation* (Ed. of 1897) p. 200.

It is very true that a corporation may be liable criminally for unlawful acts committed by its agents. Mr. Clark, at pages 199 and 200 of his learned treatise, which we have just cited, says: "We have seen that a corporation may be held liable in tort for malicious wrongs, such as libel and malicious prosecution, and

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for fraud, the malice or evil intent of its agents being imputed to it, and that it may also be held liable in a civil action for assault and battery, and that exemplary or punitive damages may be recovered in proper cases. There is a strong tendency in some jurisdictions to extend this doctrine so as to include criminal prosecutions. Dr. Wharton says that there is no good reason why the same acts for which corporations are subject to civil suit may not equally be the basis for criminal proceedings, when they result in injury to the public at large. And it has been said in a late New Jersey case, after adverting to the fact that a corporation is civilly liable for malicious wrongs: 'It is difficult, therefore, to see how a corporation may be amenable to civil suit for libel and malicious prosecution and private nuisance, and be mulcted in exemplary damages, and at the same time not be indictable for like offenses where the injury falls upon the public. That malice and evil intent may be imputed to corporations has been repeatedly adjudged.' There are no cases thus far in which a corporation has been held liable criminally for malicious wrongs, or for wrongs involving a specific evil intent, or for wrongs involving the element of personal violence. On the contrary, actual authority, as far as it goes, is against any such doctrine. A corporation may be guilty of a contempt of court by reason of acts or omissions of its officers, as where they violate an injunction. And in such a case it is well settled that the court has the same power to punish it by a fine as it would have in the case of a natural person." See, also, 1 Wharton's Criminal Law, § 87; *State v. Agricultural Society*, 54 N. J. Law, 260, 23 Atl. 680; Clark's Criminal Law, p. 79; *Orr v. Bank*, 1 Ohio, 36, 13 Am. Dec. 588; *Com. v. Proprietors*, 2 Gray (Mass.) 339; *Mayor v. Ferry Co.*, 64 N. Y. 624; *U. S. v. R. R. Co.* (C. C.) 6 Fed. 237. Other authorities will be found cited in Clark on Corporations at pages 199 and 200.

However this may be, the law will not punish a man, or hold him to answer an indictment, for an act which he did not and could not himself commit, or in the commission of which he did not participate. Whenever property has been seized by an officer of the court by virtue of its process, it is to be considered as in the custody of the court, and under its control for the time being, and this principle applies to property which has been taken into possession by receivers, who are considered as acting for the court, and also, in a certain sense and in civil cases, in behalf of the corporation. A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite*, the fund or property in litigation, when it does not seem equitable to the court that either of the litigants should have possession of it. He holds the property for the benefit of all the parties interested. His title and possession is that of the court, and any

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attempt to disturb his possession or to interfere with him when he is acting under the authority and orders of the court is contempt, and punishable accordingly. 3 Purdy's Beach on Private Corporations (1905) § 1195.

Our opinion is that the receivers were indictable, at least individually, for having committed the nuisance, but that the defendant railway company was not so indictable. The judge charged the jury that, if they were satisfied beyond a reasonable doubt from the evidence that since the defendant railway company had been placed in the hands of receivers by the federal court, the receivers had, by their servants or agents, operated the same and willfully allowed their cars to remain in the public road for one or two hours at a time, and thereby obstructed it, and that said obstruction was not necessary to the proper management of the road, they should return a verdict of guilty against the railway company, to which charge the defendant railway company excepted, and assigned the said instruction as error. It is our opinion that in the charge as given to the jury the law was not properly explained to them, and the court committed error in holding that the railway company, in any view of the evidence, was criminally liable under the indictment returned by the grand jury. This error entitles the said defendant to another jury; but, in view of what we have said, we presume that the solicitor will not proceed further in the case as against the railway company. BROWN, J., did not sit in hearing of this case—not being present.

CHESAPEAKE & O. RY. CO. v. CORBIN'S ADM'R.

(Supreme Court of Appeals of Virginia, March 3, 1910.)

[67 S. E. Rep. 179.]

Railroads—Injury to Persons on Track—“Licensees”—Customary Use of Track.*—Where the roadbed of a railroad had long been used with the knowledge and tacit consent of the railroad as a common passageway by the public at all times, a pedestrian on the roadbed was a “licensee,” and the railroad owed him the duty of ordinary care to avoid injuring him.

Negligence—“Discovered Peril.”†—The doctrine of “discovered peril” is a qualification of the rule that contributory negligence bars a recovery, and involves the principle that, though plaintiff was guilty of negligence in exposing himself to peril, he may recover where defendant, after knowing of the danger, could have avoided the injury by the exercise of ordinary care, but failed to do so.

Railroads—Injury to Persons on Track—Licensees—Discovered Peril.‡—Where a pedestrian killed by a train was a licensee, to whom the trainmen owed the duty of keeping a reasonable lookout to avoid injuring him, and the engineer could have discovered his presence, under circumstances naturally inducing belief that he was unconscious of danger, in time to have warned him of the approach of the train, or to have stopped it and avoided the accident, and failed to do so, the railroad was liable.

Railroads—Death of Licensee—Negligence—Evidence.—In an action for the death of a licensee struck by a train, evidence held to justify a finding of a negligent failure to exercise ordinary care to avoid injuring decedent, authorizing a recovery notwithstanding decedent's negligence.

Trial—Demurrer to Evidence—Determination—Admissions.—Where the jury might have found a verdict for plaintiff, the court on a demurrer to the evidence must so find.

Error to Circuit Court. Alleghany County.

Action by W. W. Corbin's administrator against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

*For the authorities in this series on the question what does, and does not, constitute a license to travel on a railroad track or right of way, see first foot-note of *Lamphear v. New York, etc., R. Co.* (N. Y.), 32 R. R. R. 636, 55 Am. & Eng. R. Cas., N. S., 636; last foot-note of *Thompson v. Aberdeen & A. R. Co.* (N. Car.), 32 R. R. R. 95, 55 Am. & Eng. R. Cas., N. S., 95; last foot-note of *Bailey v. Lehigh Valley R. Co.* (Pa.), 31 R. R. R. 167, 54 Am. & Eng. R. Cas., N. S., 167.

†See first foot-note of *Neary v. Northern Pac. Ry. Co.* (Mont.), 31 R. R. R. 758, 54 Am. & Eng. R. Cas., N. S., 758.

‡See second foot-note of *Southern Ry. Co. v. Smith* (Ala.), 33 R. R. R. 446, 56 Am. & Eng. R. Cas., N. S., 446.

Chesapeake & O. Ry. Co. v. Corbin's Adm'r

R. L. Parrish, for plaintiff in error.

Chas. & D. Curry and Wm. E. Allen, for defendant in error.

WHITTLE. J. This action was brought by the administrator to recover damages of the Chesapeake & Ohio Railway Company for the alleged negligent killing of his intestate, W. W. Corbin.

The writ of error brings under review a judgment for the plaintiff on a demurrer to the evidence.

The accident occurred in the daytime, within the yard limits, in the town of Covington. The railroad at that point is double-tracked, and runs nearly east and west; east-bound trains run on the southern track, and west-bound trains on the northern track.

For a year prior to his death, Corbin had been working as a laborer in Covington and the vicinity, and on the occasion of the accident he was walking in a westerly direction on the southern track, and stepped off between the tracks to avoid an east-bound freight train. He walked on between the tracks until the train had passed, and then stepped upon the northern track, crossing it diagonally, and continued his westerly course, walking on the ends of the cross-ties outside the northern rail. He had proceeded in that manner 20 or 30 steps when he was struck from behind by a regular west-bound freight train, and fatally injured.

The general contentions on behalf of the defendant company are that the train, consisting of 42 empty cars drawn by one of its largest engines, was traversing a curve, which so obstructed the engineer's view of the track that, though he was keeping a reasonable lookout through the front window of his cab, he did not and could not discover Corbin until after he was struck. The fireman, it was said, was engaged in firing his engine to enable it to overcome the heavy grade of the Alleghany mountain, and consequently was not in a position to keep a lookout along the track from his side of the cab, and, moreover, that the plaintiff's right to recover is barred by Corbin's contributory negligence.

On the other hand, the fact is not controverted that the road-bed had long been used, with the knowledge and tacit consent of the company, as a common passageway by the general public at all hours of the day and night. Indeed, it was shown to be more traveled by men, women, and children indiscriminately than the streets of the town. Under these circumstances Corbin was a licensee upon the right of way, to whom the company owed the duty of ordinary care to avoid injuring him.

The evidence for the plaintiff tended to show that the train was running at the rate of 10 or 12 miles an hour, and could have been stopped in 150 feet, that the curve ends 20 feet east of the point of collision, and that in looking through the front window of the cab on the engineer's side Corbin could have been seen three rail lengths, or 90 feet, from the cab, which would have placed him 45

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feet in front of the pilot. It was likewise shown by actual experiment that, despite the curvature of the track an engineer leaning out of the side window of his cab (the position which the witnesses for the plaintiff testified the engineer was occupying at the time of the accident) was visible to a person standing on the end of the cross-ties, where Corbin was when the collision occurred, from 150 to 200 yards. The evidence furthermore tended to show that the engineer was looking in Corbin's direction; that Corbin was walking along the ends of the cross-ties, and with an umbrella in his left hand, hoisted, and the handle resting across his shoulder, and with his dinner bucket in his right hand; that he was apparently wholly unconscious of danger. One of the witnesses, who passed him shortly before he was struck, testified that he appeared to be ill. Under these conditions the train was run down upon him without abatement of speed, and without ringing the bell, blowing the whistle, or giving any other signal to warn him of danger. Such warning could have been given when the train was 50 feet away, and one step from the end of the cross-tie would have saved his life.

We are of opinion that upon¹the demurrer to the evidence the record presents a case for the application of the doctrine of discovered peril. That doctrine is a qualification of the general rule that the contributory negligence of the person injured ordinarily bars a recovery. The exception involves the principle, that, although the plaintiff has been guilty of negligence in exposing himself to peril, he may nevertheless recover if the defendant, after knowing of his danger, could have avoided the injury by the exercise of ordinary care, and fails to do so.

In 29 Cyc. 530, this subject¹ is treated under the subheading, "Injury Avoidable Notwithstanding Contributory Negligence," and there is no principle of the law of negligence of more universal application. The text is sustained by decisions of courts of last resort of most of the states of the Union, of the District of Columbia, the United States courts, and the courts of England and Canada; and in no jurisdiction has the principle been more repeatedly announced than by this court. *R. & D. R. Co. v. Anderson's Adm'r*, 31 Grat. 812, 31 Am. Rep. 750; *Clark's Adm'r v. Same*, 78 Va. 709, 49 Am. Rep. 394; *Farley's Adm'r v. Same*, 81 Va. 783; *Va. M. Co. v. Boswell's Adm'r*, 82 Va. 932, 7 S. E. 383; *C. & O. R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Seaboard & Roanoke R. Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773; *Washington & So. R. Co. v. Lacy*, 94 Va. 460, 26 S. E. 834; *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Humphrey's Adm'r v. Valley Railroad Co.*, 100 Va. 749, 42 S. E. 882; *Richmond Trac-tion Co. v. Clarke*, 101 Va. 382, 43 S. E. 618; *Same v. Martin's Adm'r*, 102 Va. 209, 45 S. E. 886; *Green's Adm'r v. Southern Ry. Co.*, 102 Va. 791, 47 S. E. 819; *Savage v. Same*, 103 Va. 422,

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49 S. E. 484; *Brammer v. N. & W. Ry. Co.*, 104 Va. 50, 51 S. E. 211; *C. & O. Ry. Co. v. Farrow*, 106 Va. 137, 55 S. E. 569; *N. & W. Ry. Co. v. Denny*, 106 Va. 383, 56 S. E. 321; *Same v. Dean*, 107 Va. 505, 59 S. E. 389; *Same v. Davis*, 108 Va. 514, 62 S. E. 337; *Roanoke Ry., etc., Co. v. Young*, 108 Va. 783, 62 S. E. 961; *N. & P. Tr. Co. v. O'Neill*, 109 Va. 670, 64 S. E. 948; *N. & W. Ry. Co. v. Sollenberger*, 66 S. E. 726.

In *Seaboard & R. Co. v. Joyner*, *supra*, the court approved an instruction "that though the plaintiff may have been guilty of contributory negligence, and although that negligence may in fact have contributed to the accident, yet, if the jury believe that the defendant could in the result—that is, after it discovered his peril—by the exercise of proper care and due diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse it."

In the present case the jury would have been warranted in drawing the inference from the evidence that the engineer had actual knowledge of Corbin's peril. But it is not necessary to rest the case upon inference; it is clear that Corbin was a licensee upon the premises of the railway company, to whom its servants owed the duty of keeping a reasonable lookout to avoid injuring him. If in the discharge of that duty the engineer could have discovered Corbin's presence on the track (under circumstances which would naturally have induced belief in a reasonable mind that he was unconscious of danger), in time either to have warned him of the approach of the train or to have stopped it and avoided the accident, and failed to do so, then the company would be liable.

In *Blankenship v. C. & O. Ry. Co.*, 94 Va. 449, 27 S. E. 20, it was held, that where a railroad company knows that its right of way is constantly used as a footway by the public, it is the duty of the servant of the company to exercise reasonable care to discover persons so using the right of way, and to endeavor to avoid injuring them.

In *Williamson v. Southern Ry. Co.*, 104 Va. 146, 153, 51 S. E. 195, 197 (70 L. R. A. 1007, 113 Am. St. Rep. 1032), the court said: "The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached, where the licensee may be reasonably expected."

In *N. & W. Ry. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, it was held: "It is the duty of those in charge of a railroad train to keep a reasonable lookout at places constantly used, with the knowledge of the company, at all hours of the day by large numbers of men, women, and children, and for an injury proximately resulting from a failure to keep such lookout the company is liable."

So, in *Shear. & Red. on Neg.* (4th Ed.) § 484, it is said: "A

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railroad engineer is not bound usually to foresee the wrongful presence of any person upon the track, even where it was open to an adjoining highway, nor to foresee the wrongful entry of persons on its cars; but, if his experience has shown that persons are constantly thus entering upon the tracks or the cars, such persons, if injured by reason of the engineer's failure to use ordinary care to keep watch for them, may recover damages if the engineer could have seen them without difficulty had he kept a reasonable watch, even though in fact he did not see them. This qualification of the general rule has been sometimes denied, but incorrectly."

At section 99, the learned authors observe: "The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief." 1 *Thomp. on Neg.* § 1737.

In *Shear. & Red. on Neg.* (5th Ed.) § 101, it is said: "Plaintiff last in fault.—The foregoing rule obviously does not apply where the plaintiff's contributory negligence is, in order of causation, either subsequent to or concurrent with that of the defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if an engineer, seeing him, makes no effort to check the train, he cannot recover if, after becoming aware of his danger, he makes no proper effort to escape."

In the case in judgment the negligence of the plaintiff's intestate in walking along the ends of the cross-ties is conceded, and such negligence would have barred a recovery but for the negligence of the engineer in failing to exercise reasonable care to discover Corbin's presence on the track and to protect him. Whether or not he discharged that duty is a question of fact about which reasonably fair-minded men, upon the evidence, might differ. If the jury chose to believe the witnesses for the plaintiff, their testimony was quite sufficient to have warranted them in finding a verdict for the plaintiff, and the rule is well settled that, where the jury might have so found on the defendant's demurrer to the evidence, the court must so find. *Bass v. Norfolk Ry., etc., Co.*, 100 Va. 1, 40 S. E. 100; *Fisher v. C. & O. Ry. Co.*, 104 Va. 635, 52 S. E. 373, 2 L. R. A. (N. S.) 954.

Judgment affirmed

Affirmed.

SOUTHERN RY. CO. v. STEWART.

(Supreme Court of Alabama, Jan. 13, 1910.)

[51 So. Rep. 324.]

Railroads—Injuries to Persons on Track—Crossings—Duty of Railroads.*—Defendant railroad's employees were under no duty, arising out of the proximity of an abandoned road crossing the track, to keep a lookout for one on the track.

Railroads—Injuries to Persons on Track.†—The mere fact that a railroad track is frequently used by pedestrians does not, standing alone, show that the railroad company is informed of that use.

Railroads—Injury to Person on Track—Duty to Trespassers.‡—A railroad owes nothing to a trespasser, but to avoid injuring him after his discovery on the track.

Railroads—Injuries to Persons on Track.—That defendant railroad's engineer, while the train was $2\frac{1}{2}$ miles from where deceased was struck by the train, was in his place, looking forward, was too remote to warrant the conclusion that he discovered deceased in time to avoid the injury.

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Adelaide E. Stewart, administratrix, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 153 Ala. 51, 45 South. 51.

Paul Spcake, for appellant.

Bilbro & Moody, for appellee.

SAYRE, J. Plaintiff's intestate, much intoxicated, after staggering along the defendant's track for some distance, laid down across the track, where a few minutes later a train ran over him, causing instant death. The point at which he had lain down was about 60 feet from a road crossing. The road had in times past been maintained by the county, but had been abandoned many years before, and was not a public road. Defendant's trainmen were, therefore, under no duty, arising out of the proximity of the road, to keep a lookout for him. A. G. S. R. R. Co. v. Fulton, 144 Ala. 332, 39 South. 282; Bentley v. Ga. Pac. Rwy. Co., 86

*For the authorities in this series on the subject of the duties owing by trainmen to licensees or trespassers on railroad tracks before their presence is discovered, see second foot-note of Southern Ry. Co. v. Smith (Ala.), 33 R. R. R. 446, 56 Am. & Eng. R. Cas., N. S., 446.

†See first foot-note of preceding case.

‡See second foot-note of Rutherford v. Iowa Cent. Ry. Co. (Iowa), 32 R. R. R. 647, 55 Am. & Eng. R. Cas., N. S., 647.

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Ala. 484, 6 South. 37. After the return of this cause to the trial court on a former appeal (153 Ala. 133, 45 South. 51), evidently with the purpose of mending this phase of the case, count 4 was added, which charges "that the place where plaintiff's intestate was killed was constantly used by the public in traveling along said railroad and crossing the same at said public road crossing; that this travel was so frequent and in such numbers of people that the agents and servants of said train knew that at said place, and at the time said train was run at said place, persons were likely to be on said track." On the second trial there was evidence, it may be added, of a somewhat frequent use by the people of the neighborhood of both the railroad track by walking along it and of the road which crossed it by people passing along the latter, but none other to support the allegation that the road across the track was a public road. We may assume that it was competent for the jury, from such frequency of the use of the track as was shown, if known to the engineer in charge of the train, to infer that the engineer ought to have known of the presence of plaintiff's intestate upon the track—to find, in other words, a state of case which raised a duty on the part of the engineer to know his presence, the inadvertent neglect of which, and of the precautions indicated by ordinary care and prudence under such circumstances, not considering here negligence subsequent to the discovery of plaintiff's intestate on the track, would constitute simple negligence. To a charge of negligence, such as is here indicated, the undisputed gross negligence of the plaintiff's intestate would have been a complete answer, and for this reason, doubtless, no effort is made to charge it in the complaint.

In order to maintain the charge of wanton, willful, or intentional wrong brought against the defendant—leaving out of view just here any basis for such charge predicable of the engineer's conduct after actual discovery of the peril of the plaintiff's intestate—it was incumbent upon the plaintiff to prove that the engineer who was operating the defendant's train was at the time in fact acquainted with the conditions out of which the duty arose to know intestate's peril. No more evidential presumptions can equal in this respect that conscious knowledge which is an essential element of wanton or intentional wrong. The cases holding the doctrine that wantonness may be inferred from the negligent operation of trains at places where the public are wont to pass frequently rest upon the assumption that such conditions may be the equivalent of actual knowledge of the presence and peril of the person injured. They therefore state as a necessary condition of the application of that doctrine that the fact of such frequent passing must be known to those in charge of the train. *Duncan v. St. L. & San F. R. R. Co.*, 152 Ala. 118, 44 South. 418 and cases there cited. There are others to the same effect. Knowledge of the frequent use of a railroad track by pedestrians

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may, of course, be proved by circumstances; but knowledge of a fact is not to be inferred from the fact alone. In the case of *Central of Ga. Rwy. Co. v. Partridge*, 136 Ala. 587, 34 South. 927, answering a charge of wanton or intentional wrong, the defendant insisted that it had not been shown that its engineer had known of the conditions at the crossing, and, therefore, that its conduct could not have been wanton or intentional with reference to them. The court responded to the argument by saying: "A railroad company would be grossly negligent to place an engineer in charge of a train who was not familiar with the run, and it will not be inferred or presumed it did so. This inference or presumption, as bearing on the question whether the engineer knew of the conditions at the crossing, is evidently matter proper for the consideration of the jury. 'It is presumed the master or person placed in charge of a hazardous business or department thereof is familiar with the dangers, latent or patent, ordinarily accompanying the business he had in charge.' The master should inform the servant of the particular perils and dangers of the same"—citing *Bailey, Mast. Liab.* 109; *Wood, Mast. & Serv.*, §§ 335, 354; *Robinson Min. Co. v. Tolbert*, 132 Ala. 462, 31 South. 519. The text-books and the case cited to the court's statement were dealing with the duty which a master owes to his servant. They had not under consideration any duty owed by railroad companies to trespassers on their track and were inapt to the case. However, under the facts of that case it is not doubted that the inference of knowledge on the part of the engineer was properly indulged as an evidential circumstance, for the injury complained of was inflicted at a much-frequented public street crossing in a populous town, and hence occurred at a place where it was made the statutory duty of the defendant to observe conditions. Previously in that case (*Partridge's Case*) the court had quoted from *Southern Rwy. Co. v. Bush*, 122 Ala. 487, 26 South. 173, the following language: "While wantonness on the part of the engineer cannot be predicated on the mere fact that he ought to have seen deceased on the trestle, or on anything short of actual knowledge, yet this actual knowledge need not be positively or directly shown, but, like any other fact, may be proved by showing circumstances from which the fact of actual knowledge is a legitimate inference." And in the conclusion of the opinion, the court, as if apprehensive of too broad an interpretation of the language just theretofore used, said: "What we say is to be taken in connection with what has been said above as to the necessity of the jury's finding that the engineer was in fact acquainted with the conditions under which he was operating the train."

The case in hand is to be considered in the light of its own facts. Plaintiff's intestate was unquestionably a trespasser, and the only fact offered to show wantonness in his injury was the

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fact that people with some degree of frequency used the track at the place where he was killed, which was a place where neither the defendant nor its agents were under duty to keep a lookout for him. There was no evidential presumption that they knew of the use of the track. The fact that the track of a railroad is frequently used by pedestrians—implying, as we suppose, the lapse of some considerable time during which it is so used—is doubtless a fact tending to show that the railroad company is informed of that use; and that fact, in connection with others, may show that an engineer is acquainted with the fact itself, but, standing alone, it is totally inadequate to that end. To hold otherwise would abrogate the rule, repeatedly announced, that a railroad company owes nothing to a trespasser but to avoid injuring him after his discovery upon the track. It follows that there was no evidence of wantonness prior to the actual discovery of the presence of the plaintiff's intestate on the track. The trial court, in accordance with the view of the case already taken, instructed the jury at the defendant's request that the plaintiff's intestate was a trespasser upon the defendant's track and that the defendant was under no duty to keep a lookout for him.

On the undisputed facts, as we have already noted, plaintiff's intestate was guilty of the grossest negligence, if not deliberate suicide, which would preclude a recovery as for simple negligence in failing to discover his dangerous place on the track. This was recognized by the plaintiff, for those counts of the complaint which seek to recover as for simple negligence proceed distinctly upon the theory that the engineer was guilty of negligence in operation of his engine after the actual discovery of the position of plaintiff's intestate upon the track. To maintain that aspect of the case, which imputed either negligence or wantonness to the engineer subsequent to the discovery of deceased upon the track, it was indispensable that actual discovery should be shown. Here the case does not, in our opinion, differ materially from the case presented on the former appeal. There was testimony which would tend to show negligence subsequent to discovery, if it be assumed that discovery was made so far in advance of the moment of the death of plaintiff's intestate as to have made it possible thereafter to have avoided the injury. There was shown but one fact which can be said to make for the acceptance of appellee's theory that the engineer saw the position of deceased in time to have prevented the catastrophe, and that was that, while the train was yet $2\frac{1}{2}$ miles distant from the place where it occurred, the engineer was in his place looking forward. No witness saw him afterwards. That fact, standing alone, as it does, was too remote and inconsequential to have legitimately induced the conclusion reached by the jury. Now, as then, we feel constrained to say that it would be an unwarranted speculation to leave it to the jury to say whether or not the engineer

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was at the time looking forward, and did discover the deceased lying down on the track between the rails, in time to have avoided the injury by the exercise of due care.

On the plaintiff's evidence, that being all the evidence introduced, and in our judgment insufficient to make a *prima facie* case, the court should have given the general affirmative charge requested by the defendant. For the error pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and ANDERSON and EVANS, JJ., concur.

CHESAPEAKE & O. RY. CO. v. BALL.

(Court of Appeals of Kentucky, Dec. 2, 1908.)

[125 S. W. Rep. 246.]

Railroads—Operation of Train—Care Required.*—Where for 12 or 15 years several hundred persons traveled daily along the tracks of a railroad, which for a part of the distance were on an embankment a few feet above the level of the ground, forming an approach to a bridge across a stream, the persons were not trespassers, though on the embankment, and the trainmen must moderate the speed of trains, give notice of their approach, keep a lookout, and take such precaution as the circumstances demand for the protection of human life.

Appeal from Circuit Court, Boyd County.
 "Not to be officially reported."

Action by Cornelius Ball against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Wadsworth and Le Wright Browning, for appellant.

Rufus S. Dinkle, Watt M. Prichard, and Jas. A. Scott, for appellee.

NUNN, J. This is an appeal from a judgment of the Boyd circuit court for \$2,000, the amount claimed by appellee in damages for the loss of both feet, they having been severed at the ankles. His injuries were received upon appellant's track in the city of Catlettsburg, Ky., which contained a population of about 5,000. The proof showed, without contradiction, that appellee, one evening between 7 and 8 o'clock, was traveling from one

*For the authorities in this series on the question what does, and does not, constitute a license to travel on a railroad track, see second foot-note of preceding case.

See first head-note of preceding case.

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railway station in Catlettsburg to another, called "Hampton," which is also in the city of Catlettsburg. He first started up the west track, but saw a freight train coming towards him on that track, so he stepped over onto the east track, appellant owning two tracks between the stations named. However, before he did this, he looked back down the track to see if there was a train coming on it. Seeing none, he continued his walk up this east track, and when the engine of the first-named train was passing him he again looked back down the track upon which he was moving, but failed to discover any train following him. In a few moments after this he heard an alarm whistle and before he could look back he was struck by an engine following him, whereby he was injured as before stated. This was the version given by appellee in his testimony, and in which he was corroborated by two other witnesses who were following him on the same track, but who discovered the train and got off. These two witnesses and appellee all stated, in substance, and the train which injured appellee was running at the rate of 18 to 25 miles an hour, and that there was no warning given of its approach by ringing of a bell or the blowing of a whistle, until the alarm whistle was sounded about the time the train struck appellee. Many witnesses stated, and were not contradicted, that two-thirds or more of the travel from one of these stations to the other was along the tracks of appellant at the time appellee was injured, that it amounted to from 200 to 500 persons, on an average, daily, and had continued for 12 or 15 years.

Appellant does not claim that it was entitled to a peremptory instruction, and makes no complaint of the instructions given by the court. It is admitted that appellee presented a state of facts which required those operating the train at the time and place appellee was injured to moderate the speed of it, to give notice of its approach, to keep a lookout and take such precaution as the circumstances demanded for the protection of human lives. *I. C. R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352, *Rader's Adm'r v. L. & N. R. R. Co.*, 126 Ky. 722, 104 S. W. 774, 31 Ky. Law Rep. 1105, and *L. & N. R. R. Co. v. McNary's Adm'r*, 108 S. W. 898, 32 Ky. Law Rep. 1266, 17 L. R. A. (N. S.) 224.

The only ground that appellant presents for reversal is that the court erred in refusing to give an instruction offered by it. The instruction was to the effect that if the jury believe from the evidence that appellee, at the time he was injured, was upon an embankment approaching the bridge across the Big Sandy river then appellee was a trespasser, and in such case appellant owed him no duty, except to use reasonable means at its hands to save him from injury after he was discovered; and cites the cases of *Beiser v. Chesapeake & Ohio Ry. Co.*, 92 S. W. 928, 29 Ky. Law Rep. 249, and *L. H. & St. L. R. R. Co. v. Woolfork*,

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99 S. W. 294, 30 Ky. Law Rep. 569. These cases have reference to persons who were injured while on railroad bridges, where they had no right to be and knew it, as there had been no way provided for footmen to travel thereon, except by stepping from tie to tie. In the case at bar appellee had entered upon the track of appellant at Lanham's crossing, and continued on the track, according to appellee's testimony, a distance of about two blocks when he was struck by one of appellant's trains about the time he reached what was known as "Brown's crossing." The track for this distance was level with the surrounding lands.

Appellant's testimony was to the effect that appellee was struck after he had crossed Brown's crossing a short distance. The evidence also showed that after leaving Brown's crossing appellant's tracks gradually ascend until they reach the bridge across Big Sandy river, which was several hundred yards beyond Brown's crossing. Appellant's testimony showed that the embankment was two or three feet above the level of the ground at the place where appellee was struck. The traveling public used this embankment the same as it used the tracks from Brown's to Lanham's crossing. The difference in the height of the track where appellee was injured, as claimed by appellant, does not change the rule established in the cases first cited and authorize appellant to have the principle in the bridge cases last cited applied to the trial of this case.

For these reasons, the judgment of the lower court is affirmed.

BRUGGEMAN v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa, Dec. 20, 1909.)

[123 N. W. Rep. 1007.]

Evidence—Opinion Evidence—Conclusions.—In an action against a railroad company for personal injuries at a highway crossing, caused by failure to stop the train in time, questions to defendant's engineer as to whether he could by any possibility have stopped the train in a shorter distance than it was stopped, and whether it could have been stopped by any human agency in a shorter distance, were objectionable as calling for conclusions.

Evidence—Documentary Evidence—Admissibility.—Books on air brakes, which purported to give the distances in which trains moving at different rates of speed could be stopped by the application of air, were not admissible in evidence to show such facts, not relating to any of the exact sciences.

Railroads—Crossing Accident—Similar Facts—Similarity of Conditions.—Books giving the distances in which trains moving at different rates of speed could be stopped by the application of air were not admissible in evidence to show in what distance a train approaching a crossing could have been stopped, where the conditions under which the tests given in the books were not shown.

Appeal and Error—Discretion of Trial Court—Admission of Evidence—Documentary Evidence.—The exclusion of books offered in evidence in a personal injury action, purporting to give distances in which trains moving at different rates of speed could be stopped by the application of air, in order to show the distance in which the train causing the injury could be stopped, was within the sound discretion of the trial court.

Trial—Conduct—Remarks of Judge—Weight of Evidence.—It was error for the trial court to remark before the jury, upon ruling upon the propriety of a hypothetical question, that the testimony did not show certain facts assumed therein; the testimony showing such facts.

Railroads—Crossing Accident—Care Required—Giving Signals—Necessity.—Code, § 2072, requiring the whistle to be sounded and the bell rung at crossings, but excusing the sounding of the whistle at street crossings within the limits of cities or towns, does not remove the necessity of the giving of both of such signals at a crossing in a village.

Railroads—Crossing Accidents—Signals—Instructions.—In an action for the personal injuries sustained at a highway crossing in a village, the court instructed that reasonable and adequate signals were not given of the train's approach at the crossing; that the statute required the whistle to be sounded at least 60 rods before a road crossing, and the bell to be rung continuously thereafter until the crossing

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was passed, and that the Supreme Court had held that a failure to give such signals was negligence, but if the crossing was more than usually dangerous because of obstructions, etc., more than the statutory signals might be found to be reasonably necessary; that it was the company's duty to give reasonable and adequate warning in proportion to the danger to be reasonably apprehended on approaching the crossing, and it was negligent if it did not use ordinary care to give such warning. Held, that the instruction was erroneous in leaving it uncertain whether violation of the statute rendered defendant liable for resulting injuries.

Railroads—Crossing Accidents—Instructions—Excessive Speed.—In an action against a railroad company for personal injuries at a road crossing, claimed to have been caused by failure to give the statutory signals, and the excessive speed of the train, an instruction that the rate of speed would not of itself constitute negligence, but the jury could consider the speed in deciding whether reasonable signals were given, together with all the facts bearing on that issue, was insufficient on the question of negligence in running the train at an excessive speed, as the question of negligence on that ground would be affected by the location of the crossing, obstructions to the view on approaching it, failure to give warning signals, etc.

Trial—Instructions—Conformity to Issues.—In an action against a railroad company for injuries at a highway crossing, in which excessive speed was alleged as negligence, and the evidence made it an issue, an instruction on defendant's liability, which confined the jury's consideration to defendant's failure to give signals, was erroneous.

Negligence—Instructions—Contributory Negligence.—Plaintiff is not required to negative all negligence by him in order to recover for injuries at a railroad crossing, so that an instruction that he must be free from all negligence which caused or contributed to his injuries, in order to recover, was erroneous.

Railroads—Crossing Accident—Instructions—Contributory Negligence—Looking and Listening—Degree of Care Required.*—An instruction that in approaching the crossing plaintiff must have used ordinary care, under all the circumstances, to stop, look, and listen at such reasonable places as would best enable him to discover an approaching train was erroneous, as requiring him to exercise the highest degree of care by selecting the "best" places, instead of ordinary care.

Railroads—Crossing Accidents—Instructions—Contributory Negligence.†—An instruction that plaintiff could not recover if he could

*See second foot-note of *Blodgett v. Central Vt. R. Co.* (Vt.), 33 R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511; fifth foot-note of *Louisville, etc., Co. v. Ratcliffe* (Ark.), 33 R. R. 255, 56 Am. & Eng. R. Cas., N. S., 255.

†See second foot-note of *Chesapeake, etc., Ry. Co. v. Hall's Adm'r* (Va.), 32 R. R. 638, 55 Am. & Eng. R. Cas., N. S., 638; second foot-

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have seen the train in time to have avoided the accident by exercising ordinary care, and did not do so, was erroneous, since, plaintiff was not necessarily negligent, because the danger might have been seen and avoided.

Railroads—Crossing Accident—Contributory Negligence—Last Chance Doctrine.‡—If the railroad company's employees knew of plaintiff's danger at a crossing in time to have avoided injuring him by exercising reasonable care, the company would be liable for their failure to do so, under the last chance doctrine, though plaintiff was negligent in putting himself in a dangerous position, and negligently remained there down to the time of the accident; it not being essential, as a rule, that plaintiff's negligence shall have ceased before the accident, in order to recover under that doctrine.

Negligence—Contributory Negligence—Concurrent Negligence—Last Chance Doctrine.‡—If both plaintiff and defendant could have prevented the accident, but neglected to do so, their negligence was concurrent, and the last chance doctrine does not apply.

Railroads—Crossing Accidents—Jury Question—Proximate Cause.—In an action against a railroad company for personal injuries at a road crossing, whether defendant might not have prevented the accident, though plaintiff was himself negligent to the very time of the accident in going into, and remaining in, a dangerous position, held for the jury.

Railroads—Crossing Accidents—Injuries—Contributory Negligence.§—If a traveler sees a train at such a distance from a crossing that, in the exercise of ordinary care, he believes he can safely cross, he is not negligent in crossing, though he is unable to cross before struck by the train.

Railroads—Crossing Accidents—Duty to Stop.—In an action against a railroad company for injuries sustained at a road crossing, an instruction that, if plaintiff could have avoided the accident by stopping his team before he reached a place of peril, and failed to do so, he was negligent, was erroneous.

Negligence—Contributory Negligence—Acts in Emergencies—Question for Jury.||—It is not necessarily negligence to take the more dan-

note of *Folkmire v. Michigan United Rys. Co.* (Mich.), 32 R. R. R. 329, 55 Am. & Eng. R. Cas., N. S., 328; second paragraph of first foot-note of *Clemons v. Chicago, etc., R. Co.* (Wis.), 31 R. R. R. 491, 54 Am. & Eng. R. Cas., N. S., 491

‡See fourth foot-note of *Norfolk, etc., Co. v. Forrest's Adm'r* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; fifth foot-note of *Kinlen v. Metropolitan St. R. Co.* (Mo.), 32 R. R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722.

§See last foot-note of *Champion v. Seaboard A. L. Ry.* (N. Car.), 33 R. R. R. 263, 56 Am. & Eng. R. Cas., 263.

See last foot-note of *Rundgren v. Boston & N. St. Ry. Co.* (Mass.), 32 R. R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685; sixth head-note of *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 32 R. R. R. 639, 55 Am. & Eng. R. Cas., N. S., 639; eighth head-note of *Colorado Midland R. Co. v. Brady* (Colo.), 32 R. R. R. 113, 55 Am. & Eng. R. Cas., N. S., 113; *Kern v. Des Moines City Ry. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

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gerous of several means of escape when suddenly compelled to act in a dangerous position.

Railroads—Crossing Accident—Jury Question—Contributory Negligence.—In an action against a railroad company for personal injuries sustained at a road crossing, whether plaintiff was guilty of contributory negligence held for the jury

Evans, C. J., dissenting in part.

Appeal from District Court, Mitchell County; J. F. Clyde, Judge.

Action at law to recover damages for injuries received by plaintiff in a collision with one of defendant's trains at a public highway crossing in the town of Toeterville, in Mitchell county. The case was tried to a jury, resulting in a verdict and judgment for the defendant, and plaintiff appeals. Reversed and remanded.

Charles E. Salisbury, William H. Salisbury, and Miles K. Culver, for appellant.

Kenyon, Kelleher & O'Conner and Ellis & Ellis, for appellee.

DEEMER, J. That plaintiff received the injuries of which he complains by reason of being struck by a train on defendant's line of road, at a public highway crossing at the town of Toeterville, is conceded. But defendant denies any negligence on its part, and claims that plaintiff was guilty of negligence contributing to his injury, and that he cannot recover. That there was enough testimony to take the question of defendant's negligence to the jury is practically conceded; but it is contended that, as a matter of law, plaintiff was guilty of contributory negligence, and that, no matter what the errors of the trial court, the judgment should be affirmed on that ground. Plaintiff's counsel have exhausted the alphabet in arguing errors, and in addition thereto have used so many numerals that we have not attempted to count them. At the conclusion of their argument they summarize these alleged errors under 37 different heads, and we shall not go beyond this summary in trying to formulate an opinion which will settle the material and controlling points in the case. In view of the conclusion reached it will not be necessary to pass upon many of the propositions argued.

Defendant's railway runs east and west through the town of Toeterville, and there were two switches in the village, known as the east and west switches. A public highway running north and south crosses the right of way. The west switch is something like 892 feet from the point where the highway crosses the main line, and the east switch is about 372 feet distant therefrom. There are stockyards near the west switch something like 534 feet from the highway crossing. Westward of the highway crossing about 338 feet are some coal sheds, and also an elevator about 200 feet west of the crossing. These buildings and

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yards are all north of the railroad track and west of the highway crossing. The railway depot is south of the track, and about 57 feet west of the crossing. At the highway crossing there are two tracks, one known as the main line, and the other as the passing track, and the distance between the inside rails of these tracks is something like 8 feet and 10 inches. At the time of the accident in question there were some box cars on the passing track extending from the elevator to the stockyards, although as to this there is some dispute in the testimony. "There is an angling road, which leads from the stockyards in a gentle curve along north of the elevator and north of the passing track, and gradually nearing said passing track, and at the point where the highway crosses and passing track joins with this highway and crosses the passing track and the main track. This angling road is the road used by persons having business at the stockyards, who afterwards drive over into the village of Toeterville to make purchases and transact business. The main part of the village of Toeterville is south of the railroad tracks; the only business conducted north of the track being the stockyard business and the lumber yard business. The lumber yards are situated to the east of the north and south highway, a few feet north of the passing track, and being a few feet from the highway. The lumber in the yards was not in sheds on December 1, 1906, but was put in piles north of the lumber office, and had lanes running east and west. These piles were in places high. There is a whistle post west from the center of the public highway, and the distance of the whistle post from the place where the appellant was injured in the center of said highway is 2,793 feet 9 inches."

Plaintiff is a young farmer 34 years of age, and "on December 1, 1906, at from about 2 o'clock to 2:30 o'clock p. m., he and his father started to take a load of hogs to Toeterville. The roads were rather rough, and they drove slowly. Appellant and his father, after reaching Toeterville, drove to the stockyards, unloaded the hogs, and weighed them. They then drove slowly from the stockyards on the angling road leading by the north side of the elevator and inclining gently toward the passing track, with the intention of passing over the tracks by way of the public highway and going over into the main part of the village of Toeterville to transact business. There was a train due at the station, coming from the west at 2:30 p. m., but the testimony shows that it was late, some of it indicating that it did not arrive there on the day in question until after 3 o'clock. The testimony also shows that this train went to the little town of Stacyville, where it was turned around and immediately brought back from the east over the same track. The time taken to go to Stacyville and back was about half an hour. Appellant, with his father by his side seated in a broad-tired lumber wagon, with a hog rack on, and driving a pair of horses, one of which was

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18 and the other 12 years of age, proceeded toward the place where the angling road joins with the highway where it crosses the railroad in the village of Toeterville. According to plaintiff's testimony, when the horses approached the side track or passing track north of the main track, and just before the side track was reached, he looked west along the track to note whether there was a train coming. This glance was in the direction of the elevator. * * * When the appellant looked west toward the elevator to note whether there was a train coming, he said he could see none. His team at this time was, as he says, about up to or just going on the side track. He said: 'I didn't see anything, so I looked to the east, because I had an idea that if there was a train coming it would be from Stacyville.' Quoting now from his testimony: "I knew about the time trains were due from Stacyville—about 3:06 in the afternoon. My opinion is that this time when I looked must have been about 3 o'clock. In coming up to the track I listened to know whether there was any signal or anything of the kind. I didn't hear any." Witness further says: "I heard a short whistle, and looked back. This was when my horses were stamping the main track. I think they were just with the front feet on the main track. I was sitting on the right side of the wagon and wore a hat which the wind kind of flapped over my face on the side toward the elevator. The wind was blowing south. When I heard those sharp whistles, I hollered to my team to jump, but they didn't, so I swung them off to the left. The train came so fast that I couldn't get them off in time. The engine caught the right horse under the front legs and threw her up, and that swung the wagon, and the tender caught the wagon on the hind part and smashed that up, and the next thing I knew I had been falling down. As near as I can say I fell down beside the last coach, and when I was lying there the last coach was by. I was lying right on my back, and lifted up my leg and saw my foot was cut off. After I heard that whistle, I looked toward the engine. That was the first I had seen or heard of the train. They were coming pretty fast. If they didn't come so fast I pretty sure I got off the track. The last coach and last truck must have cut my leg off. The train had gone quite a ways before it stopped after it had hit me."

Other witnesses corroborated plaintiff to some extent: "The train which struck him was made up as follows: Engine, mail car, baggage car, smoking car, and ladies car, four coaches, and the tender and engine. The engine weighs about 40 tons, and the cars about 20 tons apiece. The train was equipped with the Westinghouse air brake system, and had the quick action triple valve. The train was equipped with four-wheeled trucks, there being two under each coach, making eight wheels under each coach. and there was a brake bearing on each wheel. There

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were four bearing places for brakes on the engine, and there were eight wheels with a brake to each wheel on the tender. The length of the engine and tender was 60 feet. The length of each coach on the train was between 50 and 60 feet. The engineer and fireman both agree that the train was proceeding at a speed of about 30 or 35 miles per hour. Other witnesses claim that the train did not slacken before it hit the appellant. When the train hit the appellant, the horses and wagon were thrown some distance. One witness says one horse was thrown from 6 to 8 rods. It is shown that the train whistled once for the crossing when out at the whistling post, which was 2,793 feet 9 inches away from the crossing. No other whistle was given until the emergency whistle was sounded, which was somewhere between 250 and 500 feet from the crossing. The engineer and the fireman testify that the bell was ringing. The witnesses of the appellant testify that the bell was not ringing, and that, though in a position to hear it, they did not hear it. The employees of the appellee claim that they made every effort to stop the train after it became evident to them that the appellant could not or would not get off the track. Claim is made by these employees that they first saw the appellant as they approached the elevator. German, the fireman, said: 'As we approached the elevator, I saw the team approaching the side track from the north, and warned the engineer. About the same time he noticed it himself, and grabbed the whistle rope.' Witness further stated: 'I first saw Will Bruggeman on that crossing that day when the team was approaching the side track. I could see Mr. Bruggeman from where he was at the time when I first saw the team.' 'I could see him, and the team, too, from the very first. I was looking straight ahead to the east down the track, and my attention was not attracted to this team until they had started, just before they got onto the side track, perhaps 5 or 6 feet before they reached the side track. Then my attention was called, and I warned the engineer. I was very near the east side of the elevator. The whole rig was visible.' The engineer stated: 'When the engine got opposite the elevator, I observed this team coming upon the side track north of the main track. I immediately grabbed the whistle, and gave several sharp blasts of the whistle. I jerked the rope successively—short blasts. I should say a second between each jerk or pull of the rope would be necessary in order to give sharp blasts of the whistle, and not give one continuous blast. The fact is, it is necessary to give a second between each jerk to make a clear, short blast, or about that. I whistled for the town just as we left the whistle post.' In answering the question, 'How many blasts of the whistle did you give?' he said, 'One long blast.'"

The testimony as to the length of time in which the train could have been stopped is conflicting; some of the witnesses

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said in from 240 to 250 feet, and others that it could not be stopped short of 450 to 500 feet. With this testimony before us we now go to some of the errors complained of. The negligence charged in the petition was (1) excessive speed of the train; (2) failure to sound the whistle and ring the bell as the train went through the town; (3) failure to sound the whistle and ring the bell as required by law before approaching the crossing, where plaintiff was injured; (4) the leaving of cars upon the side track in such a manner as to obstruct plaintiff's view of the train when approaching the highway crossing; and, (5) seeing plaintiff upon the track and in a position of peril in time to have saved him, the engineer in charge of the train failed to check or to take the usual precautions to avoid injuring him. Many complaints are made of the conduct of the court and of opposing counsel, and an argument of nearly 20 printed pages is devoted to these matters. We shall not take up these complaints in detail. It is sufficient to say the trial was not conducted with that decorum which should have been observed. Many things were said and done by counsel on either side which should not have been permitted, and it seems that the patience of the trial court was severely taxed. Remarks were made by counsel which necessarily called for a rebuke from the court, and it is doubtless true that, as viewed from the cold printed page, the court went to the very verge of propriety in some of its remarks. They were induced, however, by the conduct of counsel toward each other and toward the court, and we shall not reverse for that ground. Upon a retrial of the cause it will be well for counsel on either side to more closely observe the rules which should always govern their conduct, even in the trial of a protracted and vigorously contested law suit.

Whilst many questions are presented with reference to rulings on testimony, we shall consider but three or four. The engineer of the train was a witness for the defendant, and questions were propounded to him which were objected to as shown. Rulings of the court are also given, as well as the answers of the witness: "Q. Taking this train as you was operating that day, applied and constructed as it was, on the track at Toeterville, where you were then running and operating this train, could you have stopped this train by any possibility in any shorter distance than the train was in fact stopped? (Plaintiff objects as calling for a conclusion of the witness. Objection overruled. Plaintiff excepts.) A. No, sir; I could not. Q. Could it have been stopped by any human agency in any quicker time on that particular day than it was stopped then? (Plaintiff objects as calling for a conclusion.) Q. In your opinion? (Objection overruled. Plaintiff excepts.) A. No, sir." As these questions called for the very matters which the jury was to determine, rather than answer to hypothetical questions, or

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as to the time in which such a train might have been stopped, the court was in error in overruling the objections. This is squarely held in *Nosler v. Railroad*, 73 Iowa, 268, 34 N. W. 850. See, also, as sustaining the same proposition, 8 Ency. of Pleading & Practice, p. 751, and cases cited, including the following from Iowa: *Whitsett v. Ry. Co.*, 67 Iowa, 150, 25 N. W. 104; *Kitteringham v. Ry. Co.*, 62 Iowa, 285, 17 N. W. 585; *Smith v. Hickenbottom*, 57 Iowa, 733, 11 N. W. 664; *Allen v. Ry. Co.*, 57 Iowa, 623, 11 N. W. 614; *Muldowney v. Ry. Co.*, 39 Iowa, 622; *State v. Felter*, 25 Iowa, 67. The distinction between questions which do not usurp the functions of the jury and those which do is pointed out in *Sachra v. Town of Manilla*, 120 Iowa, 562, 95 N. W. 198.

2. Plaintiff introduced in evidence certain printed books on air brakes and air brake proceedings, purporting to give the distance in which trains moving at different rates of speed could be stopped. These were based upon facts given under conditions not stated, or, if stated, were not shown to be similar to those existing at or near the place where the collision occurred in the instant case. For many reasons these books were not admissible in evidence. In the first place they did not relate to any of the exact sciences; again the conditions under which the tests were made are not shown; and, lastly, the matter was, in any event, within the sound discretion of the trial court. *Bixby v. R. R. Co.*, 105 Iowa, 293, 75 N. W. 182, 43 L. R. A. 533, 67 Am. St. Rep. 299; *Etzkorn v. Oelwein*, 120 N. W. 636; *Kimball v. Electric Co.*, 118 N. W. 891.

3. Plaintiff called an engineer, who was qualified as an expert, and propounded to him the following question: "Q. Mr. Kerney, I call your attention to that Toeterville track. Suppose the day was clear; the track was dry; there was a little dust in the air, and the wind was blowing either from the southeast or southwest, and suppose that a train consisting of a 40-ton engine and four coaches, each weighing about 20 tons, baggage and tender and all, equipped with the Westinghouse brakes, with the quick action triple—suppose that train was proceeding at from 25 to 26 miles per hour, and suppose that an obstruction was discovered on the highway where it crosses the railroad track, at a distance varying from 202 to 268 feet, could that train be stopped before it reached that crossing by application of the brakes with which the train was equipped as stated?" Defendant objected to the competency of the witness, and also upon the ground that it embodied matter not shown by the record. The trial court then made the following record: "Court: In what respect do you claim, Mr. Ellis, that the hypothesis is incorrect or not sustained by the record? Mr. Ellis: I claim that there is no evidence here as to when this party was discovered by the engineer upon the train. The basis on which

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this question is asked formulates a certain number of feet, which is not shown to be correct, and there is nothing to show that it became in any way the duty of the engineer to stop the train at the place designated in this question. Court: Well, I think this objection should be sustained, particularly on two grounds: First, that it is not yet shown that this witness has ever handled a train substantially like this; and second, the hypothesis assumes that the party was seen on the track at a distance from 202 to 260 feet. The evidence does not show that fact. Under the testimony here he wasn't on the main track at that time. Mr. W. H. Salisbury: Your honor, the witness' horses were upon the track by the evidence when the emergency whistle was sounded. Mr. Ellis: There is no such evidence. Court: The court does not remember the testimony. Plaintiff excepts." There was sufficient testimony in the record to justify the hypothetical question, and the trial court was in error in making the ruling, and more especially in remarking before the jury that the testimony did not show certain of the assumed facts. *State v. Philpot*, 97 Iowa, 365, 66 N. W. 730; *Russ v. Steamboat*, 9 Iowa, 374; *In re Knox Will*, 123 Iowa, 24, 98 N. W. 468; *Shakman v. Potter*, 98 Iowa, 61, 66 N. W. 1045; *Coldren v. Le Gore*, 118 Iowa, 212, 91 N. W. 1066. These are all the rulings on evidence which we shall consider, as other objections are either without merit, or the matter will not arise upon another trial.

4. Coming now to the instructions, it may be said in general that they are not as clear as they should have been in presenting the exact issues to the jury. Plaintiff was relying, not only upon defendant's failure to give the statutory signals for a highway crossing, but also, upon the engineer's failure to give any kind of a warning signal in approaching the crossing in question, in view of the condition of affairs with reference to buildings, stockyards, lumber yards, etc., as shown by the record. The trial court submitted this with reference to signals: "1. That reasonable and adequate signals were not given of the approach of the train to the crossing in question"—and then said: "Other allegations made by plaintiff are withdrawn by the court, and need not be considered by you." It will be observed that nothing is said here about statutory signals. This instruction was followed by one numbered 4, reading as follows: "In the matter of signals our statute provides that 'the whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed.' Our Supreme Courts have held that a failure to give these statutory signals would constitute negligence, but that if the crossing approached was more than usually dangerous because of curves or cuts or obstructions, more than the statutory signals might be found by

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the jury to be necessary for reasonable and adequate warning of the approach of the train to the crossing. It was the duty of the defendant's employees in charge of the train in question to give reasonable and adequate warning of the approach of the train to the crossing, to be determined by the jury from the dangers to be reasonably apprehended at the crossing. If defendant's employees did not use ordinary care to give reasonable and adequate warning of the approach of the train to the crossing in question, as herein stated, then they are negligent in that respect. If they used ordinary care in giving such warning, they were not negligent in that respect. Care, to be reasonable, must be in proportion to the danger to be apprehended. On this issue the defendant's employees had the right to assume that all persons approaching or attempting to cross the crossing would exercise reasonable and ordinary caution for their own safety, bearing in mind the dangers to be apprehended at the crossing." Taking these instructions together, it is very difficult to say whether or not the jury was permitted to consider defendant's failure to give the statutory signals as evidence of negligence. It is provided by section 2072 of the Code: "A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect, * * *"

As Toeterville is neither a city nor town, but a mere village, this section seems to be applicable to the case, and the court should have so instructed the jury, and not left it so uncertain as it did. *Potter v. R. R. Co.*, 46 Iowa, 399; *McGuire v. R. R. Co.*, 138 Iowa, 664, 116 N. W. 801.

5. In its fifth instruction the court said: "Our statute does not fix any limit to the speed at which trains shall be run, even at highway crossings. In this case the speed at which the train in question was run at the crossing or approaching thereto—whether great or little—would not of itself constitute negligence, but you have the right to consider that speed in deciding whether or not reasonable and adequate signals were given, together with all the proven facts bearing on that issue." This evidently presented but one side of the question. Indeed, if the jury followed it, they were obliged to find that, under the facts of the case as disclosed by the testimony, the speed of the train could not be considered as showing negligence on the part of the defendant, save as it had bearing only upon the question of defendant's neglect to give reasonable and adequate signals. We have re-

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cently had occasion to consider the question of speed in *Hartman v. R. R. Co.*, 132 Iowa, 582, 110 N. W. 10, and we there said: "The plaintiff also alleges negligence in the speed of the train at the time of the collision. As has often been said, no rate of speed in a train moving in the open country is in itself negligence as to a person upon a crossing, but it sometimes happens, when considered with reference to the circumstances of the particular place, that the rate of speed may be an important factor in determining whether due care has been exercised. Whether, in view of the location of this particular crossing at the end of a deep cut, the obstructions, if any, to the view of the approaching traveler, the failure to sound signals of warning, and other attendant circumstances, the rate of speed in this instance had any tendency to indicate a want of reasonable care on the part of the defendant was a question of fact, and not of law." See, also, to the same effect, *Kinyon v. R. R. Co.*, 118 Iowa, 349, 92 N. W. 40, 96 Am. St. Rep. 382; *Hart v. R. R. Co.*, 109 Iowa, 631, 80 N. W. 662.

6. Instruction No. 6 read as in this wise: "If defendant permitted box cars to remain on the side track anywhere near the crossing in question, that would not constitute negligence; but, if cars were upon the side track near the crossing so as to obstruct the view of the track from the highway, that fact may be considered by you in deciding whether or not reasonable and adequate signals were given, and also in deciding whether or not the plaintiff used due care in approaching the crossing just before the accident." This instruction was also erroneous, as we view it, in that it confined the jury to a consideration of defendant's failure to give signals, whereas it should have covered other matters of negligence charged; as, for instance, the speed of the train. As sustaining this view, see *Artz v. R. R. Co.*, 44 Iowa, 288; *Reed v. R. R. Co.*, 74 Iowa, 188, 37 N. W. 149.

7. A part of the instruction No 8 reads as follows: "If you find from the evidence under previous instructions that defendant's employees in charge of the train in question were negligent in any or all the respects named in the first instruction, and that such negligence was the direct and proximate and natural cause of the plaintiff's injuries complained of, then your verdict should be for the plaintiff in some amount, unless plaintiff has failed to establish the fact that he was free from all negligence on his part that caused, or in any manner contributed to, his injuries, as explained later on in these instructions." It will be noticed that by this instruction plaintiff was compelled to negative all negligence on his part. True, the instruction also says "as explained later on in these instructions." That plaintiff is not required to negative all negligence on his part is so well established by the authorities that we need do no more than cite them. See *Jerolman v. R. R. Co.*, 108 Iowa, 177, 78 N. W. 855; *Reitveld v.*

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R. R. Co., 129 Iowa, 249, 105 N. W. 515; *Camp v. R. R. Co.*, 124 Iowa, 238, 99 N. W. 735. No subsequent instruction was given which cured this error, even if it could have been so cured.

8. This same error was repeated in the ninth instruction, and in this latter instruction the court also said: "In approaching the crossing in question plaintiff was required to be vigilant in the use of his senses, bearing in mind the dangers to be apprehended, and to use ordinary care under all the circumstances to look and listen, or to stop and look and listen, at such reasonable place or places as you may believe would best enable him to discover an approaching train and to promote his own safety. If you find from the evidence that plaintiff could have seen the approaching train by looking in the direction of its approach before he reached the crossing, and in time to have avoided the collision by ordinary care, and omitted to do so, such omission was negligence on his part; and, if it caused or in any manner contributed to plaintiff's injury, then he cannot recover, and your verdict should be for the defendant." These two sentences are also erroneous. Plaintiff's conduct was not to be judged from a finding of the jury after the accident that he did not stop to look and listen at the best place or places to discover the train. This would call for the very highest degree of care on his part, whereas nothing but ordinary care was required of him. *Schulte v. R. R. Co.*, 114 Iowa, 94, 86 N. W. 63. Moreover, in the second paragraph the jury is told that, if plaintiff could have seen the train in time to have avoided the accident, and did not then exercise ordinary care, he could not recover. This, too, is erroneous. *Baldwin v. R. R. Co.*, 63 Iowa, 210, 18 N. W. 884. In the latter case it was said: "The plaintiff cannot be deemed to have been necessarily guilty of contributory negligence if the danger might have been seen, and avoided if seen." See, also, *Artz v. R. R. Co.*, *supra*; *Christians v. R. R. Co.*, 118 N. W. 387.

9. The latter part of instruction 9 reads as follows: "In order to recover herein it is the law that the burden of proof on this issue is on the plaintiff, and to recover he must show that he himself was free from all negligence that caused or in any manner contributed to his injury. And this is true even though the defendant's employees are shown to have been negligent, and their negligence also contributed to the injury. The law will not permit a recovery on the ground of negligence whenever the injury is the result of the negligence of both parties at the same instant of time. If plaintiff has failed to show by a preponderance of the evidence that he was free from negligence contributing to his injury, your verdict should be for the defendant, unless plaintiff has made a case under the claim of 'last clear chance,' as stated in the next instruction." This was followed by the tenth instruction, reading: "If the engineer ex-

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exercised ordinary care and diligence to prevent a collision after he saw the plaintiff in a position of peril, or it was evident he was going into a place of peril, then plaintiff cannot recover on this claim of 'last clear chance.' If the defendant did not use ordinary care and diligence to prevent a collision, as herein stated, such failure would be negligence on his part, and, if it caused the accident in question, and the plaintiff was free from negligence at the instant of the collision, as herein stated, such failure would be negligence on his part, and, if it caused the accident in question, and the plaintiff was free from negligence at the instant of the collision, even though he had been negligent at some time before that instant, then and in such case the plaintiff may recover on this claim; but, if the plaintiff himself was negligent at the very instant of the collision and such negligence in any manner contributed to his injury, then and in such case the plaintiff cannot recover under this claim. The rule of 'last clear chance' does not apply to the case of a plaintiff who was himself negligent at the very instant of the injury for which he sues, if such negligence in any manner contributes to his injury."

The trial court seems to have been laboring under a misapprehension of the doctrine of "last clear chance," as it has been called. It is not true that a plaintiff cannot rely upon the doctrine if his negligence continued down to the very instant of the collision. This may be true in some cases, of course; but it is by no means an universal rule. The rule for this state, as applied to the facts which a jury might have found, is this: In the application of that doctrine it is not necessary to find that the negligence of the plaintiff had ceased to operate before the accident occurred, and that, if it had ceased to operate, the defendant with knowledge of plaintiff's danger, due to his own negligence, had failed to take reasonable precautions to avoid injury to him. It was enough to call for the application of that doctrine that the defendant's employees knew of plaintiff's danger in time to have avoided injury to him in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger, and continued to be negligent in not looking out for his own safety. *Barry v. R. R. Co.*, 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; *Doherty v. R. R. Co.*, 137 Iowa, 358, 114 N. W. 183; *Purcell v. R. R. Co.*, 109 Iowa, 629, 80 N. W. 682, 77 Am. St. Rep. 557; *Kelley v. R. R. Co.*, 118 Iowa, 390, 92 N. W. 45. There is a general agreement in the authorities that, where an engineer actually sees a person in a position of danger, and then fails to do what he reasonably can to prevent an accident, the railroad company is held responsible for the resulting injury, irrespective of the question of contributory negligence. If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power,

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and each neglected to use it, then their negligence was concurrent, and neither can recover against the other.

The trial court evidently had in mind the rule which applies when neither party discovers the other and the negligence is concurrent, or to a case where one has no better opportunity than the other to anticipate the accident, or any better means of preventing it than the other. But there was enough testimony in this case to take the question to the jury as to whether or not the defendant might not have prevented the injury, although the plaintiff was negligent down to the very time of the collision. It is one thing to hold that the continuing negligence of a plaintiff will prevent a recovery for a negligent omission of defendant to discover his peril, and quite another to hold that plaintiff's continuing negligence will prevent a recovery for the negligence of the defendant in failing to take proper care to avert the accident after the plaintiff's danger had been discovered and ought to have been appreciated. If each party is negligent in failing to discover the danger, then the negligence is ordinarily concurrent, and the doctrine of last fair chance does not apply. But if defendant discovered plaintiff's negligence and his peril in time to have avoided the injury, and did not take the necessary means to do so, then the doctrine does apply in full force; for in such cases the defendant has the last opportunity of avoiding the collision. This thought was not presented to the jury by the instructions given. Indeed that view of the case was distinctly withdrawn. In this there was manifest error.

10. Instruction No. 11, given by the trial court, heads: "If you believe from the evidence that at some time before the plaintiff reached a place of actual peril, and when by the exercise of ordinary care he might have avoided a collision by stopping his team or turning it aside after the danger signal was sounded and was heard by him, and he then saw the approaching train, it was his duty to stop the team or turn it aside, and the engineer had the right to assume that he would heed the signal and avoid the danger of a collision, and to act upon his assumption until such time as it was made evident to him that plaintiff was about to go into a place of peril in spite of the warning. If you find from the evidence that the facts were as stated in this instruction, then it was negligence for the plaintiff to go forward, and if he did so, and was injured as a consequence, he cannot recover herein, and your verdict should be for the defendant." It is somewhat difficult to understand just what this instruction means. From one point of view it is clearly erroneous, as said by this court in *Adams v. R. R. Co.*, 138 Iowa, 487, 116 N. W. 332. "If the traveler observes a car at such a distance that in the exercise of ordinary prudence he believes he can safely cross, and in undertaking to do so a collision occurs, this cannot be attributed to negligence on his part"—citing *Patterson v. Townsend*, 91 Iowa,

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725, 59 N. W. 205; Ward v. Marshalltown Co., 132 Iowa, 579, 108 N. W. 323. See, also, as supporting this proposition, Powers v. Railway, 115 N. W. 494. See page 496, where we said: "If, under the circumstances as they reasonably appeared to him, plaintiff was justified in thinking that he could cross the track in safety, and he was in fact injured by reason of the improper speed at which the car was operated, his right to recover is not conclusively negated by proof that, if he had looked just before coming into the immediate proximity of the track, he might have discovered his danger and avoided it." Moreover, the instruction tells the jury that, if plaintiff might at some time before he reached a place of peril have avoided the peril by stopping his team, or otherwise, then he was guilty of negligence. That this was error see Winey v. Railroad, 92 Iowa, 622, 61 N. W. 218; Mackerall v. Railroad, 111 Iowa, 547, 82 N. W. 975; Meyer v. Railroad, 134 Iowa, 722, 112 N. W. 194; Hartman v. Railroad, 132 Iowa, 584, 110 N. W. 10. Again, from another view, the instruction is erroneous in that it failed to state a well-understood principle of law that, when one is confronted with a sudden peril, it is not necessarily negligence on his part if he takes the more dangerous of two or more means of escape. That this is a fundamental rule see Pierson v. R. R. Co., 127 Iowa, 13, 102 N. W. 149; Cummings v. R. R. Co., 114 Iowa, 85, 86 N. W. 40, and cases cited.

For the many errors pointed out there must be a reversal of the judgment. It must not be assumed from this reversal, however, that we believe plaintiff was free from contributory negligence. That was, as we believe, a fair question for the jury under proper instructions. With proper instructions a jury might find that plaintiff was negligent, but it is not our province to do so. The parties are entitled to the verdict of a jury upon this question under proper directions from the trial court. Neither should it be inferred that we think a verdict should be returned for plaintiff under the rule of the "last clear chance." That, too, we regard as a jury question, more doubtful, perhaps, than the first question of fact. These observations are made because of defendant's insistence that, no matter what errors the trial court may have made, the judgment should not be reversed, because upon the whole record there should have been a verdict and judgment for it. We think there was enough testimony to take the case to the jury on both propositions, and that plaintiff is entitled to the judgment of a jury upon proper instructions.

Appellee's counsel suggest that the record is not in such shape that we may consider the propositions discussed, or any others; but with this we cannot agree. Proper exceptions were saved to the instruction reviewed, and all other points discussed were properly preserved of record and presented to us in the briefs.

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These latter were made more prolix and extended than they should have been, but here again counsel are equally in fault.

The result is that the judgment must be and it is reversed, and the cause remanded for a retrial.

Reversed and remanded.

ILLINOIS CENT. R. CO. v. NELSON.

(Circuit Court of Appeals, Eighth Circuit, October 25, 1909.)

[173 Fed. Rep. 915.]

Railroads—Accidents at Crossings—Contributory Negligence—Injury Avoidable Notwithstanding Contributory Negligence.—Under the rule that a railroad company may be liable for the injury of a person at a crossing, notwithstanding his contributory negligence, if after actually discovering his peril the servants of the company could by the exercise of ordinary care have avoided his injury, but failed to do so, the company cannot be held liable if such failure resulted from a defect in appliances of the train, which existed previously, and which made it impossible to stop the train in time, notwithstanding the efforts of the trainmen.

Railroads—Accidents at Crossings—Contributory Negligence—Injury Avoidable Notwithstanding. — Plaintiff's intestate negligently walked upon a railroad crossing immediately in front of a freight train, which was being backed toward the crossing at a speed of four or five miles an hour, and was knocked down between the rails, and two or three cars passed over him, causing his death. It was claimed by plaintiff that he was not killed until struck by the second car, and that the train could have been stopped before such car reached him by the exercise of proper care after his danger was discovered; but the evidence left both of such questions in doubt. It was further shown that, as soon as the brakemen on the cars saw that deceased was about to step upon the track, they shouted warnings to him, and also signaled the engineer, and that as soon as the latter saw the signals he did everything possible to stop the train; but he was not certain that he saw the first signal, nor was it certain that the failure to stop within a shorter distance was not due to defective brake appliances. Held, that such evidence did not warrant a recovery against the company; the negligence of deceased being conceded.

In error to the Circuit Court of the United States for the District of Nebraska.

Action by Benjamin Nelson, administrator of the estate of Henry C. Miller, deceased, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

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William Baird (W. S. Kenyon, Thomas D. Healy, and J. M. Dickinson, on the brief), for plaintiff in error.

Francis S. Howell (Albert W. Jeffcris, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

HOOK, Circuit Judge. This writ of error assails a judgment obtained by the administrator against the railroad company for negligently causing the death of Henry C. Miller. About 11 o'clock in the forenoon of a bright, clear day the deceased, who was 44 years of age, in the full possession of his faculties, and familiar with the locality, with no obstacle to his view of an approaching train, walked directly in front of it, and was run over and killed. It is not important whether the company was negligent in the first instance. The contributory negligence of the deceased was admitted in the petition, and the plaintiff, his representative, relied for recovery upon what is sometimes termed the "last chance rule." In the case of *St. L. & S. F. R. Co. v. Summers* (decided at this term) 173 Fed. 358, Judge Adams, speaking for the court, said:

"The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing a railroad track as precludes recovery for the primary negligence of the railroad company in operating its train so as to bring about a collision with him, yet another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could by the exercise of ordinary care have stopped its train, or otherwise have avoided injuring him, and failed to do so. *Chunn v. City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Denver City Tramway Co. v. Cobb*, 90 C. C. A. 459, 164 Fed. 41. But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence of the traveler, in law, fully exonerates the railroad company from the consequences of its original negligence, and some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof unaided by the former acts, which have been excused by the traveler's contributory negligence. Let us, therefore, inquire whether the servants of the railroad company had actual knowledge of the peril of the decedent, and whether with that knowledge it exercised reasonable care to avoid injuring him?"

To bring his case within this rule of law, the plaintiff introduced witnesses who testified to the following facts: The train was composed of 16 freight cars, of which 9 were loaded and 7 empty. Seven were equipped with air brakes, and 9 not. They

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were being backed southward towards a street crossing at a speed of 4 or 5 miles an hour; the engine being at the north end. The deceased was walking westward towards the crossing upon the north side of the street; but his intention to cross the track in front of the cars was not discovered until too late. He was knocked prostrate between the rails, and was finally taken out 70 feet or so further south, and from under either the second or the third car, according to which of conflicting accounts is true. When it became apparent deceased was about to go upon the track, the brakemen on the cars hallooed and whistled to warn him, and then gave and repeated emergency signals. The engineer, with all possible speed after he received the signals, shut off steam, reversed the engine, applied the air, and let sand upon the rails. He said he did everything possible, and stopped as quickly as he could. The engine and its appliances were in good order. Witnesses testified for the plaintiff that under the conditions which were described the train could have been stopped within from 12 to 20 feet; whereas, it actually ran more than 100 feet after the collision. Deceased, when first struck, was knocked 4 or 5 feet, and fell between and parallel with the rails, with his head to the south. He lay face downward in that position until the first car had passed over him, and was then picked up and rolled by the trucks of the second, and also by those of the third, according to some witnesses, and was mutilated by the wheels.

As the verdict was for the plaintiff, the case is stated as above from his standpoint. It should be added that the engineer, who was introduced as a witness for the plaintiff, testified that he had just been engaged in some other duty about the engine, and did not know whether he received the first emergency signal. Witnesses for the company said that after the receipt of the signal a stop in three car lengths would have been a very good one. The only evidence of negligence after the discovery of the danger of deceased was the bare fact that the train ran further than the distance within which plaintiff's witnesses said it could have been stopped, and it is claimed that the fatal injuries were inflicted, not by the collision with the first car but by the trucks and wheels of the car or cars which followed it. But the running of the train beyond the shorter distance must not only have been the cause of the fatal injuries, but must have resulted from some negligent act or omission after the dangerous position of deceased was discovered. Counsel for plaintiff appreciate this, and say:

"We do not want the court to get the notion that we contend, had the death of Miller resulted from the impact itself, or from the fall which it caused, the railroad company would be liable, provided he was guilty of negligence in coming into a collision."

As already stated, the petition disclosed his negligence. The

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evidence also showed it beyond question. After it became apparent deceased was in danger, the brakemen promptly gave such signals as were within their power, and no charge of negligence can justly be made against them. But, though they discovered the danger, they could not stop the train. All they could do was to give the signals. It is not suggested that the application of hand brakes would have been of any avail. So we must look to the engineer for the negligence within the rule. It does not follow from the mere fact that the train moved the distance it did after the brakemen discovered the danger. Their duty being performed, their knowledge was no more effectual in preventing the accident than would have been that of a flagman at the crossing. The movement of the train was consistent with the undisputed testimony of the engineer that he had been engaged upon some other duty about the engine and did not know he got the first signal of the brakemen, but that when he did get it he acted promptly and did all he could. It should be borne in mind in this connection that, even at the slow speed it is said the train was running, it moved a car length in a few seconds, and brought the trucks of the second car upon the deceased.

Again, the testimony produced by the plaintiff as to the condition of the appliances related to those of the engine, not to the air brakes on the cars, and the failure to stop within the short distance may have been due to a defective condition and operation of the latter, for aught the evidence showed. If so, that would not bring the case within the rule. A defect in mechanical appliances, existing before and continuing until after the injury, not susceptible of being rectified after the discovery of the danger carelessly incurred and before the injury is done, is not supervening negligence within the rule invoked. Were it otherwise, negligence on the part of others would have to be anticipated and provided for in adopting precautions to prevent accidents; but that is not in the measure of one's duty.

We should further say that, giving the fullest credence to the unusually minute description of what happened to deceased while under the cars, it closely approaches mere conjecture that he was not fatally injured before the second car reached him. We think defendant's motion for a directed verdict should have been granted.

The judgment is reversed, and the cause remanded for a new trial.

BYRD v. CENTRAL KENTUCKY TRACTION CO.

(Court of Appeals of Kentucky, Feb. 11, 1910.)

[125 S. W. Rep. 174.]

Appeal and Error—Presumptions—Instructions.—Where a verdict had been set aside and a new trial had, and but one set of instructions appeared in the record, in the absence of a showing to the contrary, the court on appeal must assume that they were the only instructions given on either trial.

Railroads—Collision with Animal—Evidence.—In an action against a railroad company for killing a horse, where the evidence showed that the night was dark and stormy, testimony of two witnesses, who on a later night observed the passing of one of defendant's cars at the place of collision, that the headlight enabled them to see a tin can which they had placed on the track at a distance of 300 feet, was without substantial weight or effect; it not being made to appear that the weather conditions were such as obtained on the night of the collision.

Railroads—Killing Stock—Presumption of Negligence.*—Where stock is killed by a railroad train or electric interurban car, the statute raises a presumption of negligence; but this may be overcome by satisfactory and consistent proof that the killing could not have been avoided by the exercise of ordinary care.

Railroads—Killing Stock—Ordinary Care—Evidence.†—Where the uncontradicted and unimpeached testimony of the company's servants, operating a train or electric car, shows that the killing of live stock could not have been avoided by the exercise of ordinary care, it is not proper for the jury to find otherwise.

Railroads—Killing Animal on Track—Evidence—Sufficiency.—In an action against a railroad company for killing a horse, evidence held insufficient to support a verdict for plaintiff.

Appeal and Error—Granting New Trial—Discretion.—The discretion of the circuit court in setting aside a verdict and granting a new trial will not be interfered with, unless abused.

Appeal and Error—Record—Presumptions.—Where a verdict had

*See first foot-note of *Miller v. Chicago, etc., Co.* (S. Dak.), 27 R. R. R. 32, 50 Am. & Eng. R. Cas., N. S., 32; second foot-note of *Central, etc., Co. v. Hughes* (Ga.), 26 R. R. R. 62, 49 Am. & Eng. R. Cas., N. S., 62.

†For the authorities in this series on the subject of the credibility of railroad employees as witnesses in actions against their respective companies, see last foot-note of *Miller v. Chicago & N. W. Ry. Co.* (S. Dak.), 27 R. R. R. 32, 50 Am. & Eng. R. Cas., N. S., 32; last foot-note of *Atlantic C. L. R. Co. v. Mallard* (Fla.), 24 R. R. R. 727, 47 Am. & Eng. R. Cas., N. S., 727.

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been set aside and a new trial had, and the evidence on the last trial was not in the record, the court on appeal must take it for granted that the evidence authorized the verdict.

Appeal from Circuit Court, Fayette County.

Action by Columbus Byrd against the Central Kentucky Traction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Foreman & Foreman, for appellant.

George C. Webb, Allen & Duncan, and *Stoll & Bush*, for appellee.

SETTLE, J. Appellant sued appellee in the court below for \$200, the alleged value of a horse, crippled to such an extent that he had to be shot, from a collision with one of appellee's interurban cars, alleged to have been caused by the negligence of its servants in charge of the car. There were two trials of the case, the first resulting in a verdict in appellant's favor for \$150; but this verdict was set aside, and a new trial granted appellee, to which appellant excepted. On the second trial the jury returned a verdict for appellee, upon which judgment was entered dismissing the action at appellant's cost. The latter was refused a new trial, and has appealed.

The evidence on the second trial is not in the record; but it seems to be conceded that it did not materially differ from that introduced on the first, which does appear in the record. The same instructions seem to have been given on both trials. At any rate, we find but one set of instructions in the record, and, in the absence of a showing to the contrary, we must assume that they were the only instructions given in the case on either trial.

Appellant's chief complaint is that the circuit court erred in granting appellee a new trial after the return of the verdict in his favor on the first trial, and he now insists that the judgment upon the last verdict should be reversed, and the circuit court directed to enter a judgment in his behalf upon the verdict for \$150 returned on the first trial, and costs. We cannot grant this request. In our opinion the first verdict was against the weight of the evidence. The horse was struck by appellee's car about 8:30 o'clock at night as it was running down grade on schedule time from Lexington to Versailles, at a speed of about 18 miles an hour. It was quite dark and raining very hard, the air was full of vapor, and the water running in streams down the glass of the vestibule in front of the motorman, as well as upon the glass in front of the headlight, which greatly obstructed the view of the motorman and prevented him from seeing the usual distance in front of the car. Somewhat more than 100 feet before the car reached the point where the horse was standing there

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was a curve in the railroad track, which prevented the headlight from being thrown upon the point of collision until the car had about passed the curve. Just before reaching the curve the car gave the usual curve signal, or whistle, and when it reached a point from which the motorman could see, and did in fact discover, the horse, the car was within 120 feet of the animal. The motorman was keeping a careful lookout ahead of him, and upon discovering the horse he at once applied the air brakes, the quickest and best appliance for stopping the car; but, finding that this would not stop the car in time to prevent its striking the horse, he immediately applied the reverse current, which is done by cutting off the current, and reversing the machinery of the car, and using the current to run it in the opposite direction. But neither the application of the air brakes nor reversal of the electrical current did, or could, prevent the car from colliding with the horse, although they stopped it at a point less than its length beyond where the horse had been standing.

The foregoing facts were established by the testimony of the motorman and conductor, and while the 20 passengers in the car were not in a position to see the horse before or at the time of the collision, such of them as were required to testify corroborated the motorman and conductor as to the darkness, rainfall, and other conditions that so greatly obstructed the vision of the motorman and prevented the headlight from illuminating the railroad track ahead of the car. These witnesses also agreed with the motorman and conductor as to the rate of speed of the car and the manner in which it was suddenly stopped. The only testimony contradictory of that of appellee's witnesses was that of two persons, who on another and later night observed the passing of one of appellee's cars at the place of collision, and claimed to have discovered that its headlight enabled them to see at a distance of 300 feet a tin can which they had placed on the railroad track at the point where the car collided with appellant's horse.

The purpose of this testimony was to show that the motorman could and must have seen the horse when 300 feet from him, and, if so, that the car could have been stopped before striking him. It was not made to appear, however, that the weather conditions were such as obtained on the night of the collision, and, if not, this testimony, if, under the circumstances, competent at all, was without substantial weight or effect. In the case of *Early's Adm'r v. Louisville, Henderson & St. Louis Railway*, 115 Ky. 21, 72 S. W. 350, 24 Ky. Law Rep. 1810, this court, in considering similar tests, said: "We do not attribute to the tests made by some of the witnesses, as to the distances from which certain objects placed by them on the railroad track at the point of the accident could be seen, the importance attached to them

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by the appellant, for we know that objects to which the attention is called, in advance, can more readily be seen and identified by a person stationed on the ground at a given distance than by one on a rapidly moving train, however keen his vision or constant his lookout ahead of the train. But these tests do not of themselves, or in connection with the remainder of the evidence, supply the facts from which negligence on the part of appellee may be inferred."

From the fact that live stock is killed by a railroad train, or electric interurban car, the statute raises a presumption of negligence in the killing; but, when sued for negligently killing stock, a railroad company may overcome the statutory presumption of negligence by introducing satisfactory and consistent proof that the killing could not have been avoided by the exercise of ordinary care. And when this is done by the uncontradicted and unimpeached testimony of the company's servants operating the train, or electric car, it is not proper for the jury to find otherwise. *McGhee, etc., Receivers, v. Guyn*, 98 Ky. 210, 32 S. W. 615, 17 Ky. Law Rep. 794; *Same v. Gaines*, 98 Ky. 182, 32 S. W. 602, 17 Ky. Law Rep. 748; *Ill. Central R. R. Co. v. Gholson*, 66 S. W. 1022, 23 Ky. Law Rep. 2213.

Except the unsatisfactory experiments of appellant's two witnesses with the tin can, we fail to find in the record any evidence upon which to rest the verdict of \$150, returned for appellant by the jury on the first trial; and as it should have had no effect, when weighed with the testimony furnished by appellee's motorman and conductor, to say nothing of that of its other witnesses, which reasonably showed that the collision of the car with the horse could not have been avoided by the exercise of ordinary care, it is manifest that the circuit court, in setting aside the first verdict and granting appellee a new trial, did not err. But, even if less certain than we are as to the weight and effect of the evidence on the first trial, it would nevertheless be our duty to refuse to reverse the judgment appealed from, on account of the circuit court's action in setting aside the first verdict and granting a new trial, for we could, in no view of the case, say that in so ruling that court abused its discretion.

An excellent statement of the law on that subject may be found in the opinion of this court in the case of *Pace v. Paducah Railway & Light Co.*, 89 S. W. 105, 28 Ky. Law Rep. 279, wherein it is said: "It has been frequently pointed out by this court that the discretion of the trial court in granting a new trial, or refusing it, is one that will not be disturbed by the appellate tribunal, except it is made to appear that it has been abused. The trial judge hears the evidence, as does the jury, and, while the verdict is primarily that of the jury, still the trial judge's concurrence is necessary to its completeness as to the basis of the judgment. He likewise hears

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the witnesses, and has even a better opportunity, perhaps, for judging of their demeanor and surroundings as liable to improperly affect the result of the trial, than the jurors themselves have. It is peculiarly his business to see that the trial is fair and that the jury is not imposed upon, either by prejudicial misconduct of parties or counsel, or having produced to them evidence under erroneous rules, as well as to see that they are not subjected to other improper influences in reaching their verdict. For a breach of any of these matters, as well as for his belief that the verdict is contrary to the evidence, he may refuse to sanction it, and grant a new trial." *Mussellam v. C., N. O. & T. P. Ry. Co.*, 126 Ky. 509, 104 S. W. 337, 31 Ky. Law Rep. 908; *Walls v. Walls*, 99 S. W. 969, 30 Ky. Law Rep. 949; *Cochran v. Cochran*, 93 S. W. 18, 29 Ky. Law Rep. 333; *City of Louisville v. Johnson*, 69 S. W. 803, 24 Ky. Law Rep. 685; *Dieckman v. Weirick*, 73 S. W. 1119, 24 Ky. Law Rep. 2340.

Manifestly, the last verdict should not be disturbed, if, as it seems to be admitted by appellant, the evidence on the last trial was as on the first; and if the admission of its being the same were wanting, as the evidence on the last trial is not contained in the record, we must take it for granted that it authorized the verdict returned by the jury in appellee's favor.

The instructions are free from prejudicial error, and the pleadings support the judgment.

Wherefore the judgment is affirmed.

ENGVALL v. DES MOINES CITY RY. CO.

(Supreme Court of Iowa, May 12, 1909.)

[121 N. W. Rep. 12.]

Street Railroads—Operation of Cars—Care Required by Motorman.*—A motorman, operating a street car on streets much used for travel and congested by obstructions thereon, must keep a constant lookout not only ahead of his car, but also to the right and left thereof, so that he may discover persons on the track or approaching it in dangerous proximity to his car, and, where the motorman cannot by keeping a constant lookout discover the near approach of persons, he must use his sense of hearing to avoid injury to them.

Street Railroads—Operation of Cars—Care Required by Motorman.†—A motorman operating a street car, when his view of the street is so obstructed as to prevent seeing the approach of persons to the track, must keep his car under complete control until his view becomes unobstructed.

Street Railroads—Collisions—Negligence—Evidence.—Evidence, in an action for the death of a city fireman in a collision between a hose wagon, responding to a fire call, and a street car, held to show actionable negligence of the motorman.

Street Railroads—Collisions—Actions—Evidence—Instructions—"Heed."—Where the petition, in an action for the death of a city fireman in a collision between a hose wagon, responding to a fire call, and a street car, alleged that the street railway company was negligent because its motorman did not pay any "heed" to the ringing of the gong on the hose wagon, and the evidence showed that the motorman did not hear the approaching hose wagon, the court properly submitted to the jury the question of the motorman's negligence in not hearing the approaching hose wagon in time to avoid the accident; the word "heed" meaning "hear."

Trial—Instructions—Construction as a Whole.—Where, in an action for the death of a person struck by a street car, the court correctly defined the kind and degree of care required of the street railway company, an instruction that the company, in the operation of its cars, must exercise ordinary care to provide against such accidents as may result from the prudent use and operation thereof, though erroneous because it is the imprudent operation of a car that creates liability, was not misleading.

*See last head-note of *Louisville Ry. Co. v. Johnson's Adm'r* (Ky.), 34 R. R. R. 298, 57 Am. & Eng. R. Cas., N. S., 298; second foot-note of *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 32 R. R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722.

†See last foot-note of *Kinlen v. Metropolitan St. Ry. Co. (Mo.)*, 32 R. R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722.

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Trial—Instructions—Invading Province of Jury.—Where, in an action for the death of a person struck by a street car, the court charged that the jury must determine whether the street railway company was negligent as alleged in the petition, and that the question of its negligence was for the jury, an instruction that the failure of the motorman to exercise such care as charged in the petition was negligence was not prejudicial because invading the province of the jury.

Trial—Instructions—Grouping Facts.—An instruction, which groups the facts to a certain extent and states that the jury may consider such facts with all the other facts in determining the issue, is not open to the objection that it refers to specific parts of the evidence.

Trial—Instructions—Refusal to Give Instructions Covered by Charge Given.—It is not error to refuse instructions fairly covered in the charge given.

Trial—Special Findings.—In an action for negligent death, special findings as to the length of time decedent would probably have lived had he not been killed, the probable aggregate net amount of his accumulations during that time, and the present aggregate net amount of such accumulations, were not ultimate, but necessarily inhered in the general verdict, and could not well be answered without danger of confusion, and were properly refused.

Death—Excessive Damages.—A city fireman 46 years old, healthy, and able to work, with a life expectancy of 24 years, and receiving a salary of \$1,000 a year, was killed. He had accumulated property worth \$2,000. He had no source of income aside from his personal earnings. Held, that a verdict for \$8,250 was excessive and would be reduced to \$6,000.

Appeal from District Court, Polk County; James A. Howe, Judge.

Suit to recover damages for the death of C. A. Carlson. Plaintiff had judgment for \$8,250 and the defendant appeals. Affirmed on condition.

Guernsey, Parker & Miller, for appellant.

Thomas A. Cheshire, for appellee.

SHERWIN, J. The plaintiff's intestate was a hoseman connected with the Des Moines fire department, and he was killed in a collision between a hose wagon and one of the defendant's street cars. The accident occurred at the intersection of Walnut street and Sixth avenue a little after 9 o'clock at night in January, 1907. The hose wagon belonged at a fire station located on East Walnut street, and at the time of the accident it was responding to a fire call from a point west of Sixth avenue and was moving rapidly along Walnut street close to the north side thereof. The defendant has tracks running east and west on Walnut street and north and south on Sixth avenue, and a gen-

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eral waiting room from which all of its city cars radiate on Sixth avenue one block south of the place of the collision. The car that collided with the hose wagon was a north-bound Sixth avenue car. It had left the waiting station but a few moments before, and, after making two or three stops before reaching the Walnut street track, it went on and struck the hose wagon near the north curb line of Walnut street. Among the acts of negligence alleged in the petition were these. "That the defendant was negligent in that its motorman, I. M. Bonar, did not pay any heed or attention to the ringing of the gong on the said hose wagon as it approached Sixth avenue; that the defendant was further negligent in that its motorman did not see the hose wagon and the horses attached thereto, as they approached Sixth avenue, before his vision was obstructed by the car of the defendant, which was standing just east of Sixth avenue; that the defendant was further negligent in that its said motorman did not look for the approach of the said hose wagon and horses thereto attached, or other vehicles, before moving his car northward from behind the car of defendant standing just east of Sixth avenue."

In the instructions given to the jury the negligence complained of was stated in the following language: "That the defendant's motorman on car No. 188 was negligent in not hearing or seeing, in time to avoid the accident, the hose wagon as it approached Sixth avenue and Walnut street when he was causing said car to be moved into Walnut street to the place where it collided with the hose wagon of the fire department. That the defendant's said motorman was negligent in not looking to the eastward on Walnut street before causing the said car to go northward on Sixth avenue so as to be unable to avoid the collision." The two acts of negligence stated above were the only ones submitted to the jury, and the appellant strongly urges that the evidence is wholly insufficient to warrant the finding that the motorman was negligent in either respect named, or that the acts charged as negligence were the proximate cause of the injury complained of, and that the court therefore erred in overruling its motion for a directed verdict and in overruling its motion for a new trial. It is said that there is no evidence tending to show that the motorman was negligent in not looking to the east on Walnut street before moving his car so far north on Sixth avenue as to be unable to avoid the collision, or tending to show that his failure to look was the proximate cause of the accident. The evidence clearly shows, and in fact it is conceded, that the street intersection where the accident occurred is one of the busiest intersections and railway crossings in the city of Des Moines, and that at the time in question general travel on both Walnut street and Sixth avenue was further congested at that point by obstructions in both streets.

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It is clearly the duty of the driver or motorman of a street car, in the exercise of reasonable care under the circumstances, to keep a constant lookout, not only ahead of his car, but also to the right and left thereof, so that he may discover persons upon the track and persons approaching it in dangerous proximity to the approaching car. *Doran v. Railroad*, 117 Iowa, 442, 90 N. W. 815; *Barry v. Railroad*, 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; *Doherty v. Railway Co.*, 137 Iowa, 358, 114 N. W. 183; 2 *Thompson*, Neg. §§ 1382, 1476, 1477, and cases cited. And where the conditions are such that the motorman cannot by keeping a constant lookout discover the near approach of persons, he should use his sense of hearing to avoid collisions with or injury to them. As the car in question went north from the waiting station, it stopped at the switch point, which was about 60 feet south of the Walnut street track, and again when it had reached the south curb line of Walnut street. At this time, and when the accident happened, one of the defendant's cars was standing on the Walnut street track with its rear end somewhere near the east line of Sixth avenue, and the evidence shows that this car somewhat obstructed the motorman's view of Walnut street east of the crossing. He had an unobstructed view of Walnut street west and Sixth avenue north when he stopped at the curb line on Walnut, and, his view to the east being partly obstructed by the car in question, it was his duty, in the exercise of ordinary care, to keep a sharp lookout to the east for persons or vehicles approaching from that direction, and, if his view was so far obstructed by the car standing on the Walnut street track that he could not see the near approach of persons, it was his duty to keep his car under complete control until his view of the street was unobstructed. *Bremer v. St. Paul City R. Co.* (Minn.) 120 N. W. 382. The evidence shows that he did not look to the east, nor attempt to do so, until his attention was directed to the rapidly approaching hose wagon by a lady standing on the street. The streets were well lighted, and the hose wagon was readily seen and heard a distance of two or more blocks away. Its gong was continuously sounded from the time it left the fire station until the accident happened, and the evidence tends strongly to show that it could be, and probably would have been, heard and seen by the motorman had he been exercising care for the approach of persons or vehicles on the east of his car. There is evidence tending to show that the motorman might have seen the hose wagon through the windows of the car standing on Walnut street had he looked in that direction, and that a discovery of it even at that time would have enabled him to avoid the collision.

The appellant contends, also, that there is no evidence tending to show that the motorman was negligent in not hearing the approach of the hose wagon; but we do not concur in this view of

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the record. As we have already said, if the motorman's view to the east was completely obstructed by the standing car, it was his duty to exercise care to hear the signals of approaching persons or vehicles, and, if he failed in this respect, it would be negligence. He knew the dangerous character of the crossing, and that persons and vehicles of different kinds were liable to be passing east and west upon Walnut street at any time, and from the condition of the street at that point he knew that the north part of it would be the most used. There were windows and a door in the vestibule of the car which he says he kept closed at the time in question. He also testified that he could not hear when the vestibule was closed. In view of this testimony and the condition existing at the time, we think there is evidence tending to show negligence in housing himself so that he did not hear what would otherwise have been plainly heard, namely, the gong and the approach of the hose wagon.

The appellant also says that the court erred in submitting to the jury the question whether the motorman was negligent in not hearing the approaching hose wagon in time to avoid the accident. The petition alleged that the defendant was negligent in that its motorman, I. M. Bonar, did not pay any heed or attention to the ringing of the gong on the hose wagon as it approached Sixth avenue, and it is said that it is not a charge that the motorman was negligent in not hearing the gong, but is a charge that, having heard it, he paid no heed or attention thereto. There is merit in the criticism. But one of the accepted definitions of "hear" is to "give heed; listen; harken." Century Dict. And this, in connection with the fact that the evidence on the subject was to the effect that the motorman did not hear the approaching hose wagon, leads us to think the court very properly construed the word "heed" as meaning "hear."

In its sixth instruction the court told the jury that it was the duty of the defendant, in the operation of the car in question, "to exercise ordinary care to provide against such accidents as might result from the prudent use and operation thereof." The instruction is wrong. It is the imprudent operation of a car that creates liability; but in several of the other instructions given the court clearly, fully, and correctly defined the kind and degree of care required of the defendant, and we are of opinion that the jury was not misled by the use of the word "prudent" in the sixth instruction. It is so manifestly wrong and so clearly in conflict with the rule elsewhere clearly and correctly stated that a jury of average intelligence would not misunderstand it. See *Smith v. Insurance Co.*, 115 Iowa, 217, 88 N. W. 368, 56 L. R. A. 271, 91 Am. St. Rep. 153; *Flam v. Lee*, 116 Iowa, 289, 90 N. W. 70, 93 Am. St. Rep. 242; *Schaefer v. Insurance Co.*, 133 Iowa, 205, 100 N. W. 875, 110 N. W. 470; *Brown v. Coal Co.* (Iowa) 120 N. W. 732.

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In the same instruction this language was used, following that already quoted: "And the failure on his part to exercise such care, as charged by the plaintiff in his petition, would constitute negligence." This part of the instruction is said to have invaded the province of the jury. If construed as it is by the appellant, it would undoubtedly do so, and standing alone, would be erroneous. *McBride v. Railway Co.*, 134 Iowa, 398, 109 N. W. 618; *Root v. Railway Co.*, 122 Iowa, 469, 98 N. W. 291. But if the specific language objected to be considered with the language immediately preceding it, it may fairly be said that the court told the jury that the failure to exercise ordinary care would constitute negligence and nothing more. If the language be given the meaning contended for by the appellant, we think it was not prejudicial because of the rest of the same instruction and other instructions given. The jury was first told in the sixth instruction that it was to determine whether the defendant was negligent as alleged in the petition, and, following the language objected to, the jury was repeatedly told, in effect, that the question of the defendant's negligence was for its determination. The instruction is too long for incorporation in this opinion, but a careful reading of it convinces us that the jury could not have misunderstood the language complained of or have been misled by it.

Another paragraph of the sixth instruction is criticised on the ground that it referred to specific parts of the evidence but nowhere told the jury whether certain facts would indicate negligence and other facts indicate care. The facts were grouped to a certain extent in the instruction, and the jury was told that it might consider them with all the other facts and circumstances disclosed in evidence for the purpose of determining whether the motorman was or was not negligent. There is no merit in the criticism. *Medearis v. Insurance Co.*, 104 Iowa, 88, 73 N. W. 495, 65 Am. St. Rep. 428.

Some complaint is made of the eleventh instruction given by the court relating to the damages, but we think it did fairly direct the jury to consider the earnings of the decedent at the time of his death.

The defendant requested a large number of instructions which were refused, and error is predicated on such refusal. The instructions given were very full and fairly covered all that was contained in the requests which might properly have been given. Special findings were asked: (1) As to the length of time the deceased would probably have lived had he not been killed when he was; (2) the probable aggregate net amount of his accumulations during the time; and (3) the present worth of the aggregate net amount of such accumulations. These special findings were not ultimate in their nature and necessarily inhered in the general verdict and could not well be answered without

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danger of confusion. In such cases it is not error to refuse them. *Thomas v. Schee*, 80 Iowa, 237, 45 N. W. 539; *Phoenix v. Lamb*, 29 Iowa, 352.

The verdict was for \$8,250, and the trial court refused to disturb it. It is here claimed that it is excessive, and that the trial court erred in not setting it aside. At the time of his death, Carlson was 46 years of age, with an expectancy of about 24 years. He was healthy and able to work, and was then earning and receiving \$1,000 a year. He had accumulated property of the value of about \$2,000. He had no source of income aside from his personal earnings. An allowance of \$8,250 as the present worth of the loss to his estate for the estimated period of his life is equivalent to a finding that he would have accumulated and left to his estate had he lived about \$20,000. During over one-half of his active business life he had accumulated but \$2,000, and we think there is no warrant for finding that he would have accumulated \$20,000 had he lived out his expectancy. His years of usefulness as a fireman could not in the very nature of things have followed his expectancy of life, and we can see no substantial basis for the amount awarded his estate.

If the plaintiff shall elect to file in this court a remittitur of all in excess of \$6,000 within 30 days from the filing thereof, the judgment for such amount will stand affirmed; otherwise it will be reversed. A motion to strike the appellant's argument because not in the form required by the rule was submitted with the case and is overruled. The argument does not comply with the rule, but the disregard thereof is not of so serious a nature as to require drastic treatment.

Affirmed on condition.

GOULD *et al.* v. MERRILL RY. & LIGHTING CO.

(Supreme Court of Wisconsin, May 11, 1909.)

[121 N. W. Rep. 161.]

Appeal and Error—Estoppel to Allege Error—Drawing of Jury.

The drawing of a jury for trial after issue joined, but before filing the summons or complaint, is not error of which a party who has participated in the selection of that jury can complain.

Appeal and Error—Harmless Error—Refusal to Discharge Jury.

Refusal to discharge a jury and grant a venire de novo in an action for injuries caused by the operation of a street car because the trial was interrupted by several adjournments necessitated by the illness and death of the wife of the presiding judge, during which adjournments the jurors had opportunity to see the points surrounding the place of accident, was not error prejudicial to defendant.

Street Railroads—Injuries Caused by—Pleading—Negligence.*—A

complaint in an action against a street railroad company for injuries to plaintiff's team caused by the negligence of one of defendant's motormen in continuously sounding the gong on his car in a loud manner, frightening plaintiff's team, alleged that the motorman saw that the team was frightened and knew that, unless he desisted from rapid approach and from sounding the gong, he would cause the team to get beyond control, but notwithstanding carelessly and negligently continued to sound the gong and make a loud noise, and negligently failed to stop or to slow up the car, causing the team to run away. Held, that the complaint charged the motorman with ordinary negligence, and not with gross negligence; it being necessary to gross negligence that the act or omission causing the injury must have been wanton or willful.

Street Railroads—Injuries to Persons Using Street—Duty of Mo-

torman.†—Though a street railroad company is not liable for damages caused by a horse taking fright at a street car in motion, or at the usual noise made by such car or at the ordinary and proper sounding of a gong on such car, yet the motorman is required to keep a proper lookout to avoid collisions with persons or vehicles also using the streets, and to do all that an ordinarily careful person under like cir-

*For the authorities in this series on the question what does, and does not, constitute gross negligence, see last foot-note of *Louisville & N. R. Co. v. Roth* (Ky.), 32 R. R. R. 610, 55 Am. & Eng. R. Cas., N. S., 610.

†For the authorities in this series on the subject of the care required of those in charge of street cars in order to avoid collisions with other users of street, see last foot-note of *Birmingham, etc., Co. v. McLain* (Ala.), 33 R. R. R. 463, 56 Am. & Eng. R. Cas., N. S., 463; third head-note of *Kinlen v. Metropolitan St. Ry. Co.* (Mo.), 32 R. R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722.

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cumstances would do to avoid injuring others lawfully using the street.

Street Railroads—Injuries Caused by—Negligence of Motorman.†—Where a motorman on a street car, knowing that plaintiff's team near the track was frightened by the ordinary sounds caused by the approach of the car and the ringing of the bell, and that there was danger of injury, continued to approach the frightened team to run alongside of it, or just behind it, continually sounding his gong, and without reducing the speed of his car, and without proper regard for the rights of others lawfully using the street, and in such manner as ordinarily prudent persons under like circumstances would not do, he was negligent, rendering the street car company liable for injury to the horses caused thereby.

Street Railroads—Injuries Caused by—Questions for Jury.—Whether a motorman in failing to reduce the speed of his car or stop ringing the gong thereon was negligent, considering the shortness of the time and distance traversed after discovering that a team was being frightened by the approach of the car, held, under the evidence, a question for the jury.

Negligence—Proximate Cause—Questions for Jury.—Where a probable potential cause of an accident is shown which may be identified as the proximate cause by inferences of fact from direct or circumstantial evidence before the jury, the latter may identify this as the proximate cause, although strict logic might discover other causes which the jury might, from the same evidence, have found to be the proximate cause.

Appeal and Error—Harmless Error—Instruction.—An instruction that ordinary care means that care which an ordinary prudent person ordinarily exercises under the same or similar circumstances was not prejudicially erroneous for using the adjective form "ordinary" to modify the adjective "prudent," instead of the adverb "ordinarily," since the jury must necessarily have understood the word as modifying or qualifying the next succeeding word, and could not have been misled thereby.

Street Railroads—Injuries by—Pleading—Amendment.—An action against a street railroad company for injuries to horses caused by the negligent operation of one of defendant's street cars, not being against one of the railroad corporations covered by section 1816b, St. 1898, requiring notice of the injury to be given to such corporations within one year of the accident, or to recover damages for injuries to the person mentioned in subdivision 5, § 4222, St. 1898, providing that no action to recover damages for an injury to the person shall be maintained unless within one year after the event causing such damages notice in writing shall be served upon the person or corporation claimed to have caused the damage, refusal to permit defendant to

†For the authorities in this series on the subject of the duties and liabilities of street railways with respect to frightening teams, see last foot-note of *Olney v. Omaha, etc.*, St. Ry. Co. (Neb.), 23 R. R. R. 300, 46 Am. & Eng. R. Cas., N. S., 300.

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amend the answer by pleading that the action was commenced more than a year after the injury, and that no notice of the injury was given, was proper.

Trial—Instructions—Requests—Instructions Already Given.—Refusal to give correct requested instructions is not error where the instructions given fairly cover the points contained in the requests.

Appeal and Error—Harmless Error—Exclusion of Evidence.—Error in rejecting competent evidence was harmless where the same witness was permitted to give such evidence fully on cross-examination without objection.

Appeal and Error—Exceptions for Review—Admission of Evidence.—An assignment of error to the alleged erroneous admission of evidence will not be considered on appeal where proper exception was not taken in the trial court.

Damages—Instructions—Duplication of Damages.—Where, in an action against a street car company for injuries to horses frightened by the operation of one of defendant's cars, plaintiff offered evidence of the value of the use of the horses over and above the cost of keeping, instructions permitting the jury to assess damages consisting of the depreciation in the market value of each horse caused by the injury, plus the value of the use of the horse during the time it was incapacitated from work by reason of the injury, plus the cost of doctor's services and medicines and services of others necessarily performed in taking care of such horse, plus the reasonable and necessary cost of feeding such horse during such time, not exceeding altogether in any case the actual value of the horse on the day the injuries were received, was not objectionable as authorizing the duplication of damages, as the value of the lost use mentioned in the instructions must be considered with reference to the evidence as the value of the use of the horse over and above the cost of its keeping.

Damages—Measure—Injuries to Animals.—Where, in an action for injuries to a horse, the full value at the time the horse is injured is recovered, there can be no additional recovery for loss of use of the horse.

Costs—Items—Entries, Pleadings, and Proceedings.—Under St. 1898, § 2921, authorizing the allowance of costs for necessary entries, pleadings, and proceedings in an action according to the practice of the court, costs are properly allowed for drafting requests for instructions, affidavits on motion to modify an order, notice of examination of adverse party, and an order denying a motion to limit the examination of the adverse party, and for attending motion out of term to limit the examination and attendance on cross-examination of witnesses out of court.

Appeal from Superior Court, Lincoln County, Almon A. Helms, Judge.

Action by E. N. Gould and others against the Merrill Rail-

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way & Lighting Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Among other references upon the part of the appellant were the following: *Rideout v. Winnebago T. Co.*, 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601; *O'Brien v. C., St. P., etc., Ry. Co.*, 102 Wis. 628, 78 N. W. 1084; *Cawley v. La Crosse, etc., Co.*, 101 Wis. 145, 77 N. W. 179; *Walters v. Railway Co.*, 104 Wis. 251, 80 N. W. 451; *Collins v. Janesville*, 117 Wis. 415, 94 N. W. 309; *Weed, etc., Co. v. Whitcomb*, 101 Wis. 266, 77 N. W. 175; *Whereatt v. Worth*, 108 Wis. 291, 84 N. W. 441, 81 Am. St. Rep. 899; *Duthie v. Washburn*, 87 Wis. 231, 58 N. W. 380.

Among other references upon the part of the respondents were the following: *Van Salvellergh v. Green Bay, etc., Co.*, 132 Wis. 166, 111 N. W. 1120; *Eastwood v. La Crosse, etc., Co.*, 94 Wis. 163, 68 N. W. 651; *Fay v. Minneapolis, etc., Co.*, 131 Wis. 639, 111 N. W. 683; *White's Supp. to Thompson, Neg. § 1420*; *Nolan v. Kroening*, 130 Wis. 79, 109 N. W. 963; *Bohn v. Racine*, 119 Wis. 341, 96 N. W. 813; 1 *Sutherland, Dam. § 57*; 4 *Sutherland, Dam. § 1101*; *Dunn v. State*, 125 Wis. 181, 102 N. W. 935; *Palmer v. Schulz (Wis.)* 120 N. W. 348; *Hill v. Durand*, 58 Wis. 160, 15 N. W. 390; *Woodruff v. Depere*, 60 Wis. 128, 18 N. W. 761; *Bonesteel v. Orvis*, 31 Wis. 117; *Lam Yee v. State*, 132 Wis. 527, 112 N. W. 425; *Sweain v. Donahue*, 105 Wis. 142, 81 N. W. 119.

F. J. Smith and John Van Hecke (B. R. Goggins, of counsel), for appellant.

Smart & Curtis, for respondents.

TIMLIN, J. The plaintiffs in this action, founded upon alleged negligence of defendant, had a special verdict finding the motor-man in charge of defendant's car negligent; that this negligence was the proximate cause of the injury to plaintiff's horses, wagons, and harness; that the plaintiffs were free from contributory negligence, and their damages were \$450. Considering the common place nature of the action and the amount involved, the litigation seems to have been conducted with such zeal, industry, and pugnacity from the selection of the jury to the final taxation of costs as to present an unusual number of disconnected questions, necessitating to cover these questions an opinion of some length. We shall be obliged to rule upon some of them without discussion.

1. Drawing the jury for the trial of the cause, as provided for in chapter 295, p. 446, Laws 1905, as amended by chapter 272, p. 912, Laws 1907, after the commencement of the action and after issue joined, but before filing the summons or complaint, was, to say the least, not error of which appellant after having participated in the selection of that jury can complain.

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We are inclined to the opinion that the fact of an action pending and at issue gives the right to demand and obtain in the manner provided by these statutes the jury there mentioned, and that these objections, including the objection that the notice of trial did not fix any time for the hearing while the venire fixed a definite time for the return of the jurors, are technical and unsubstantial.

2. Error is assigned because of the refusal of the trial court to discharge the jury and grant a venire de novo upon the ground that the trial commenced on April 29, 1908, and was interrupted by several adjournments necessitated by the illness and death of the wife of the presiding judge, and was not finally concluded until June 6, 1908, although only six days of this time was spent in actual trial. It is said that during these adjournments the jurors had opportunity to see, and did frequently see, the street in question and points therein mentioned by the witnesses, but no actual misconduct on the part of the jury is charged. There was in this no error prejudicial to appellant.

3. The complaint averred that plaintiffs were copartners and owners of two certain horse teams with wagons and harness, the defendant a corporation operating a street railway on West Main street and elsewhere in the city of Merrill, and, while the plaintiffs were lawfully traveling with said teams and wagons westwardly on West Main street, the motorman of defendant in charge and control of an electric street railway car also moving westwardly in said street approached the teams from the rear, and "negligently, carelessly, unnecessarily, repeatedly, and continuously sounded the gong on said car in a loud and noisy manner," causing the rear team to become frightened. The motorman saw that the team was frightened, and knew that, unless he desisted from rapid approach and from sounding of the gong, he would cause the team to get from the control of the driver and do serious damage, but notwithstanding "carelessly and negligently continued to sound said gong and make a loud noise, and negligently and carelessly failed to stop or to slow up or place the car under control, but negligently, carelessly, and noisily ran the said car along behind the said team, and caused the same to become further and more excited and to start to run," etc., so that the teams both ran away, and were injured to plaintiffs' damage as stated. It is contended that this complaint is based upon a charge of gross negligence, hence the trial court erred (1) in not so construing it; (2) in overruling the objections to the reception of evidence of negligence; (3) in not granting a motion for a nonsuit; (4) in not granting defendant's motion for a directed verdict; (5) in not correcting the verdict and rendering judgment in favor of the defendant on the verdict as corrected. But all these alleged errors disappear if the complaint merely charged ordinary negligence. We find no charge of gross

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negligence in the complaint. All the acts of the motorman complained of are charged to have been done "negligently, carelessly," etc., not intentionally. True, it is averred that the motorman knew the probable consequence of approaching rapidly ringing his gong, but that is not enough under the rule relative to gross negligence adopted by this court. Nothing is more common in ordinary negligence cases than to submit a question to the jury asking whether the defendant knew the consequences of his act. The disposition has been to err in such case by including in one question whether the defendant knew or ought in the exercise of ordinary care to have known these consequences. *Du Cate v. Brighton*, 133 Wis. 628, 114 N. W. 103; *Howard v. Beldenville L. Co.*, 134 Wis. 644, 114 N. W. 1114. But, to constitute gross negligence, the act or omission causing the injury must itself have been wanton or willful. *Wilson v. Chippewa V. E. R. Co.*, 135 Wis. 18, 114 N. W. 462, 115 N. W. 330. Illustration: The consequence of ringing the bell may be to frighten one team, but it may be required at the place by law or at the same time necessary to warn another. This group of alleged errors is therefore not effective for reversal.

4. Appellant next contends that, assuming the complaint to state a cause of action for ordinary negligence, there was no evidence to support the finding of the jury that defendant was guilty of negligence which was the proximate cause of the injury complained of, hence that there was error in denying a nonsuit, in denying a motion to direct a verdict for defendant, in denying a motion to change the answers of the jury affirming its negligence and affirming proximate causation, to negative answers, and in denying certain requested instructions drafted with this view of the case. There is an unusual, and it would almost seem an unnecessary, difference between counsel with respect to the facts proven. This difference has materially increased the labor of this court, and required a very close critical examination of the facts in detail.

Summed up, these facts are as follows: In the city of Merrill, Genesee street, 50 feet in width and running north and south, crosses West Main street, 60 feet in width, and running east and west, and this crossing we take for a starting point. All points referred to, all acts of negligence, and all injuries in question occurred in West Main street west of this point and while the car in question and plaintiffs' teams were traveling west on West Main street. At this point there is on the northeast corner Wenzel's hardware store variously referred to by witnesses, on the northwest corner Farkvam's saloon or hotel, a like point. Next to this on the west is Haase's, a like point. One hundred and thirty feet west from the west boundary of Genesee street is the east boundary of Wright street which coming in from the north connects at right angles with, but does not cross, West

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Main street. Thirty feet further west along West Main street is the west boundary of Wright street, and here at the north-west corner of these two streets is a building referred to by the different witnesses as the Commercial Hotel, Thatcher's Hotel, and Tremont House. One hundred and ninety-two feet west of the west line of Wright street brings us to the east line of Juve's house, and a few feet farther west to a point nearly in front of White's house where the car overtook and passed the teams, and where one of the horses of the rearmost team jumped onto the rear bolster of the forward wagon, and became entangled in a chain strung between the bolster stakes. Witnesses designate the same place or point by different names, variously estimate time and distances and relative positions, and this presents some apparent confusion and much contradiction in the testimony. But the testimony fairly warrants the conclusion that the driver of the rearmost team had heard the gong and the gong was rung at the above-mentioned point of beginning, although there are some loose statements which might create an impression that this occurred 50 feet further back or at the other boundary of Genesee street. A fair interpretation of the evidence leads us to believe that the ringing of the gong which disturbed the rearmost team began at the aforesaid point where the west boundary of Genesee street intersects West Main street. The whole distance covered from the time the motorman began sounding his gong until the accident was therefore 352 feet, as near as may be. With the street car moving at the rate of eight miles an hour, it would require only 30 seconds to cover this distance, while, if we accept the plaintiffs' version that the car was moving at greater speed, the whole thing occurred in much less than 30 seconds. The impression from the testimony of witnesses, as is generally the case, would be that much greater time was occupied in the transactions detailed and in the sounding of the gong. What happened in this short space of time while the car was traveling this short distance seems to be that at the said point of beginning the motorman observed in the street ahead of him going in the same direction and on the north side of the track two teams, one a short distance ahead of the other each with a wagon stripped for hauling lumber and the rear team rather close to the track. He sounded his gong, and the rear team was swerved away from the track toward the curb by its driver, and showed signs of fright. As the car approached the indications of fright increased until the car reached a point in the track when the front part of the car was abreast of the front wheels of the rear wagon, and in this relative position the car and the wagon moved at the same speed and in the same direction, and continued for some distance. The motorman did not slack the speed of the car and kept on sounding the gong; the rear team running at a rate of speed to maintain their position

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relative to the car. In this way the car and the rear team, moving on substantially parallel lines, overtook the forward team, and the rear team was, of course, brought on a run against the rear wheels and bolster of the forward wagon. This was about in front of White's house and 352 feet from the place of beginning. One of the frightened horses of the rear team being so brought up against the forward wagon leaped onto the wagon, became entangled in the chain mentioned, and the car without slackening its speed passed both teams at this point, and from the combination of circumstances consisting of the rear team coming up running and jumping onto the wagon, and the car passing ringing the bell, the forward team took fright and ran away, causing quite a severe wound to the horse which had leaped on the wagon, the breaking of some parts of the wagon, the harness, and some slight scratches on each of the other three horses.

The foregoing statement is made upon the facts with inferences therefrom which the jury might and probably did by their verdict find to be true. From this we think it is apparent that the only negligence which can be charged against the defendant consists in the motorman unnecessarily continuing to sound the gong after he saw the frightened condition of the rear team of horses, or in failing to stop or slacken the speed of his car under the same circumstances. The case is very close on this point; but the witness Miller testified: "The street car was going along at full speed, and the motorman was ringing the bell. It got up to the team, and it, the street car, did not lessen its speed when coming up to the team." The street car did not go ahead of the horses at any time before the horses jumped onto the wagon. The bell began to ring at Wenzel's store. The witness Maas testified that the bell rang up to the time of collision. The witness Germain testified that he drove the rear team, that he heard the bell ringing as the cars came up behind him, the horses began to tramp around a little and sheered off, and the car kept coming and ringing and ringing, and the horses kept getting worse until the car came up to him, when the horses started to run, and the car kept on going and ringing the bell and the horses kept on running, until, with the car slightly behind or alongside of the horses, they overtook the foremost wagon, and one of the horses leaped onto the back part of this wagon.

While a street railway company is not liable for damages caused by a horse taking fright at the sight of a street car in motion, or at the usual noise made by such car in motion, or at the ordinary and proper sounding of a gong or ringing of a bell on such car, yet the motorman or driver is required to keep a proper lookout to avoid collision with persons or vehicles also using the streets, and to do all that an ordinarily prudent and careful person under like circumstances would do to avoid injuring others lawfully using the streets. *Glettler v. Sheboygan*

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L. & P. Co., 130 Wis. 137, 109 N. W. 973. As was said in *Bishop v. Belle City S. R. Co.*, 92 Wis. 139, 65 N. W. 733, the mere fact that the horses took fright at an approaching car gives no right of action. In the instant case the plaintiffs by pleading and proof do not, however, rely upon any such ground of liability. What is claimed here, and what the evidence tends to support, is that the motorman, knowing that plaintiffs' horses were frightened by these usual and ordinary sights and sounds, and that there was a liability of injury resulting, continued to approach the frightened team and to run alongside of it or just behind it continuously sounding his gong, and without slacking the speed of his car, and without proper regard for the rights of others lawfully using the street, and in such manner and to such extent as ordinarily prudent persons under like circumstances would not do.

The close point on the evidence is whether, considering the shortness of the time that the ringing continued and the shortness of the distance traversed, the motorman could be held to have been negligent in failing to slack his speed or stop ringing his bell. Some little time for consideration and decision must be allowed him, no doubt, but, on the whole, there seems to be sufficient evidence to take the case to the jury. On the point that the condition of the team running away was so visible to the motorman that he must have known the cause of their fright, and that he should either have slacked the speed of his car or stopped ringing his bell or both before he attempted to approach and run alongside of the runaway horses, there are many cases affirming this ground of liability. *Oates v. Railway Co.*, 168 Mo. 535, 58 L. R. A. 447, and see cases collected in a note to *Greene v. Louisville R. Co.*, 7 Am. & Eng. Ann. Cas. 1127, 1129; also in note to *Union P. R. Co. v. Cappier*, 69 L. R. A. 513; *Thompson, Neg.* §§ 1419, 1420; *Clark on Street Railway Acc. Law*, § 114; *Heer v. Warren-Scharf Co.*, 118 Wis. 57, 94 N. W. 789.

5. Appellant next contends that the finding of the jury that the negligence of the motorman was the proximate cause of the injury in question rests upon conjecture only, because no one can say that the injury in question would not have happened if the motorman had desisted from his speed and noise, or that it did happen because of such failure to desist. We cannot agree with this refinement. When a probable potential cause is shown which may be identified as the proximate cause and made to answer the legal definition of proximate cause by inferences of fact from direct or circumstantial evidence before the jury, the latter may identify this as a proximate cause, although strict logic might discover other causes which the jury might from the same evidence have found to be the proximate cause. In other words, what is the proximate cause of an injury is usually and ordinarily a question of fact, and probative inferences from facts in evidence cannot be disposed of by styling them conjectures.

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6. The defendant requested the court to instruct the jury "that 'ordinary care,' as used herein and wherever used in these instructions and in the verdict, means that care which an *ordinarily* prudent person ordinarily uses under the same or similar circumstances," instead the court instructed the jury "'ordinary care,' as used in these instructions, means that care which an *ordinary* prudent person ordinarily exercises under the same or similar circumstances." This error assigned is based upon the fact that the court used the adjective form "ordinary" to qualify or modify the adjective "prudent," instead of the adverbial form "ordinarily." This is a very common error, not only in conversation, but in writing, and the writings of some of the great masters of the English language are not without many slips of this kind, a collection of which may be found in text-books on grammar, composition, and rhetoric. But such errors are not ground for reversal unless the jury were misled thereby. In the instant case the jury must have understood the word "ordinary," notwithstanding its form, to qualify or modify the next succeeding word. The probability is that they understood the expression in the latter sense. The departure from the correct rule is not so great here as that in *Reffke v. Paper Co.*, 136 Wis. 535, 117 N. W. 1004. The case in this respect is ruled by *Nass v. Schulz*, 105 Wis. 146, 151, 81 N. W. 133, and *Pumorlo v. City of Merrill*, 125 Wis. 102, 107, 103 N. W. 464. And see *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 281, 106 N. W. 1077, and cases.

7. The action was commenced more than a year after the injury, and no notice of the injury was given, and the defendant on the trial asked leave to amend its answer by pleading this failure. The defendant street railway is not one of the railroad corporations covered by the provisions of section 1816b, St. 1898, and the action is not one to recover damages for injury to the person mentioned in subdivision 5, § 4222, St. 1898. The application to amend was properly denied.

8. Error is assigned in refusing to instruct the jury that there was no evidence of negligence on the part of the defendant up to the time the car caught up to or reached the rear team. For reasons already given this request was properly refused.

9. Error is assigned because the court refused upon proper request to instruct the jury that the defendant was not negligent because the horses became frightened from noises which are usual and ordinary and incident to the operation of street railway cars, and, applying this, that, if the jury found it to be the fact that the motorman sounded the gong for a proper purpose and in the usual manner, this was not negligence, but one of the noises incident to operation. This was a proper charge under the facts of the instant case, but we consider it covered by the charge given in several different forms, particularly the follow-

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ing: "The defendant or its motorman cannot be deemed negligent in controlling and operating a car merely because horses frightened by reason of the ordinary, usual noises, incident to the moving and operating of cars, or because horses become frightened by sigh of the street car, or by necessary sounding of a gong on the car in the ordinary, usual manner, or because horses become frightened at the usual ordinary speed of the car while it is moving, being operated with reasonable and ordinary care, along its track. * * * Ordinary care does not require that the motorman in charge of a street car shall stop a street car or slow it up merely because a team traveling on a street shies or shows signs of uneasiness; * * * yet if it is reasonably apparent to the motorman that the team of the traveler on the street has either gotten beyond the control of the driver, or is about to get beyond his control, so that it is apparent that an injury and damage is probable and reasonably certain if he, the motorman, does not slow up or stop his car, or put it under control, then you may find that ordinary care would require the motorman under such circumstances to either slow up or stop the car, or place it under control, if the circumstances permit, and that, if he fails to do so, he may be deemed not to have exercised ordinary care, provided always that you are satisfied an ordinarily prudent person would ordinarily so do under the same or similar circumstances." Substantially the same rule was given with respect to the continued ringing of the bell. These instructions fairly covered the requests of the defendant on such points. Hence there was no error in refusing the requests.

10. Error is assigned in rejecting evidence tending to prove that the injured condition of three of the four horses arose from overwork hauling heavy loads on a hard road during the six days next succeeding the runaway in question. This would seem to be quite a serious mistake had it not been that the same witness was permitted to testify fully on this point on cross-examination without objection. Under these circumstances the error was obviated.

11. After the accident in question, the horses concerned appeared to have been engaged in heavy work for the next succeeding six days. Later on three of them upon which there were no serious visible wounds or injuries, and which were not shown to have been thrown down or to have collided with anything, developed, according to the testimony on the part of the plaintiffs, sickness materially affecting their ability to work and their market value, which sickness it is unnecessary to describe here in detail. Error is assigned in permitting witnesses to testify that in their opinion such sickness and disability was caused by the accident in question, but we are unable to consider this assignment of error because no sufficient exception was taken to the admission of this evidence.

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12. In addition to evidence tending to show a depreciation in value of each one of the four horses by reason of the injury in question, the plaintiffs offered evidence of the value of the use of a team per month over and above the cost of keeping, also the cost of feeding each horse per day, also the rate of wages of men employed to take care of the horses, also the value of the service per day to take care of the horses. Objection was taken by defendant on the ground that the cost of feeding horses and keeping is not a proper element of damage. The evidence as to the number of days' time lost was objected to, but the court overruled the objections, and in his instructions to the jury upon this point submitted four items of damage to each horse: (1) The difference between the actual value of the horse at the time of the accident and the value at the time of its recovery from the injuries sustained so far as it had recovered; (2) the loss of the use of each horse being unable by reason of these injuries to work for such period as the evidence showed; (3) the expense incurred by the plaintiffs in attempting to cure each horse of its injuries resulting from the accident; and (4) the actual reasonable and necessary cost of feeding the horse during such time. This portion of the charge relative to damages was excepted to. Considering the evidence before the jury and the instructions which permitted the jury to assess damages consisting of the depreciation in market value of each horse caused by the injury, plus the value of the use of the horse during the time it was incapacitated from work by reason of the injury, plus the cost of doctor's services and medicines and services of others necessarily performed in taking care of such horse, plus the reasonable and necessary cost of feeding the horse during such time, not exceeding all together in any case the actual value of the horse on the day the injuries were received, the damages were not in excess of compensation for the loss. The value of the lost use mentioned in the instructions must be construed with reference to the evidence as offered, and means the value of the use of the horse over and above the cost of its keeping. There was consequently no duplication of damages. 1 Sutherland, Dam. (3d Ed.) § 57; Oleson v. Brown, 41 Wis. 413; Plunkett v. Railroad Co., 79 Wis. 222, 48 N. W. 519; Page v. Town of Sumpter, 53 Wis. 652, 11 N. W. 60. But, where the full value at the time the horse was injured is recovered, there can be no additional recovery for loss of use of the horse. Page v. Town of Sumpter, *supra*.

13. The items of costs objected to and brought to the notice of this court by appellant's brief consisting of drafting requests for instructions and drafting affidavits on motion to modify an order, and drafting notice of examination of adverse party, drafting an order denying a motion to limit the examination of adverse party, attending motion out of term to limit the exami-

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nation and attendance on examination of witnesses out of court, were properly allowed. Section 2921, St. 1898. "Necessary entries, pleadings, and proceedings in an action according to the practice of the court." It follows that the judgment should be affirmed.

Judgment of the superior court affirmed.

MARTIN v. COLUMBIA ELECTRIC ST. RY., LIGHT & POWER CO.

(Supreme Court of South Carolina, Feb. 16, 1910.)

[66 S. E. Rep. 993.]

Street Railroads—Injuries—Negligence—Violating Speed Ordinance.*—Running a street car at a greater rate of speed than allowed by ordinance shows negligence per se in an action for injuries.

Appeal and Error—Presentation Below—Instructions—Misstating Issues.—In order to make available on appeal the trial court's error in misstating the issues raised by the pleadings, it must be called to his attention by the complaining party.

Trial—Instructions—Requests—Refusal—Action of Trial Court.—A statement by the trial judge that he would not read to the jury defendant's requests, but would pass on them in his general charge, and cover all requests which were correct, was not an absolute refusal to charge a request.

Trial — Injuries — Actions — Instructions.—In an action against a street car company for intestate's negligent death, a requested charge that if both plaintiff and defendant were negligent, so that the negligence of each, acting at the same time, caused the injury complained of, and it could have happened only from the negligence of both as the proximate cause, plaintiff cannot recover, was substantially covered by a charge that, if intestate was negligent and her negligent act was one of the agencies bringing about her death, the jury should find for defendant.

Trial—Instructions.—In an action for injuries by being struck by a street car, the court charged that if the jury found that decedent did "what an ordinary woman would have done, and she exercised the care that an ordinary woman would have done—in other words, that she was not negligent—"they should determine whether defend-

*See second foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; first foot-note of *Dyson v. Southern Ry. Co.* (S. Car.), 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486; first foot-note of *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48; third head-note of *Kern v. Des Moines City Ry. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29; fifth head-note of *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311.

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ant was negligent. The court elsewhere charged that decedent was held to the standard of care which the law denominated ordinary, reasonable care, which standard the jury must fix from their knowledge of themselves, their fellowmen, and from the circumstances and peril surrounding plaintiff when she approached the street car, and if she fell short of the conduct required by an ordinary person in what she did, and that contributed to her injuries, the jury should find for defendant. Held that the charge, when the quoted part was considered with the remainder thereof, was not erroneous in making the standard of care required of decedent the conduct of an ordinary woman, instead of that of one of ordinary care and prudence.

Trial—Instructions—Province of jury.—The court could not charge what particular facts would constitute contributory negligence without invading the province of the jury.

Trial—Instructions—Instructions Already Given.—Where, in an action against a street car company for the death of one attempting to cross the track, the court charged fully as to the duty resting upon one attempting to cross the track, it was not error to refuse a requested charge on that question.

Appeal from Common Pleas Circuit Court of Richmond County; G. W. Gage, Judge.

Action by Susan Martin, administratrix of the estate of Mary Martin, deceased, against the Columbia Electric Street Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Defendant's third exception was to the failure to charge its request that if the jury believed from the evidence that both plaintiff and defendant were negligent, so that the negligence of each, acting at one and the same time, caused the injury complained of, and that the injury would not have happened from the negligence of one of them alone, but only from both as the proximate cause, plaintiff cannot recover. The trial court charged, among other things, that the intestate was bound to use ordinary care, and if she was careless or negligent, and her negligent act caused her death, or was one of the agencies causing it, and if she fell short of the conduct required of an ordinary person in what she had done or failed to do, and such omission was one of the proximate causes of her death, the jury must find for defendant.

The fourth exception was to a charge that if the jury concluded that intestate did what an ordinary woman would have done, and she exercised the care that an ordinary woman would have done, and was not negligent, the next question for the jury to decide was whether the company failed in its duty to her, to which defendant excepted on the ground that it fixed a lower standard of conduct than required by law, in that it made the

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conduct of an ordinary woman the criterion of due care. The court, in addition to the part of the charge stated in reference to the third exception, charged that plaintiff was held to the standard of care which the law denominated ordinary, reasonable care, and the jury must fix that standard from their knowledge of themselves, their fellowmen, and the circumstances under which plaintiff was injured.

The fifth exception was to the court's refusal to charge defendant's request as to plaintiff's failure to look and listen before attempting to cross the track, etc.

*Barron, Morse & Barron and R. B. Herbert, for appellant.
R. Beverly Sloan and John J. Earle, for respondent.*

GARY, A. J. This is an action for damages arising out of the alleged negligence of the defendant in causing the death of plaintiff's intestate.

The complaint alleges: "That in the evening, on or about the 23d day of October, 1906, the defendant, while running one of its cars on one of its tracks on Gervais street, at or near its intersection with Laurens street, on a downgrade, in the said city of Columbia, at a rapid rate of speed and in violation of law, without warning or signal, and without having air brakes or other brakes than hand brakes on said car, and without having a fender on said car, and without having the headlight of said car lighted, carelessly, negligently, willfully, and recklessly ran on and against said Mary Martin, who was crossing said Gervais street diagonally, facing almost in the direction in which said car was being run, and with her back towards said car, and who was in the act of crossing said track, knocking her down, running over her, and dragging her body along the track of said defendant, causing the death of her, the said Mary Martin." His honor, the presiding judge, instructed the jury that there was no testimony tending to show that the plaintiff was entitled to punitive damages. The jury rendered a verdict in favor of the plaintiff for \$1000, and the defendant appealed upon exceptions which will be set out in the report of the case. We proceed to consider them in regular order. First Exception. There was testimony tending to prove negligence on the part of the defendant in three particulars: (1) In running the street car at a greater rate of speed than was allowed by the ordinance of the city, which is negligence *per se*. *Dyson v. Railway*, 83 S. C. 354, 65 S. E. 344. (2) In failing to give proper signals. (3) In running the car without a headlight, in violation of the city ordinance. Under these circumstances, the question as to the proximate cause of the injury was properly submitted to the jury.

Second Exception. In the case of *Brickman v. Railway*, 74 S. C. 306, 54 S. E. 553, a similar exception was overruled, on the ground that, "when the presiding judge errs in stating the

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issue raised by the pleadings, it is incumbent on the parties to call his attention to such error, if it is to be made the basis of an appeal." Numerous other cases sustaining this principle are cited in the argument of the respondent's attorneys.

Third Exception. In commencing his charge the presiding judge said: "I am going to take the liberty of not reading over these requests to the jury. I am going to pass on them in my general charge and cover all the requests, which in my judgment are pertinent and correct." It will thus be seen that there was not a refusal to charge the request; and in the general instructions it was substantially charged.

Fourth Exception. When the portion of the charge set out in the exception is considered in connection with the entire charge, it will be found to be free from error.

Fifth Exception. The presiding judge was not requested to charge simply "that it is the duty of one crossing a railroad track to use his senses of sight and hearing." He could not have charged what facts would constitute contributory negligence in the particular case without invading the province of the jury. In the case of *Weaver v. Railway*, 76 S. C. 49, 56 S. E. 657, 121 Am. St. Rep. 934, the rule is thus stated: "The presiding judge could not have charged the said requests without intimating to the jury the inference to be drawn from the facts therein so carefully set out in detail. The instructions would have been in violation of article 5, § 26, of the Constitution, and were therefore properly refused." Furthermore, the presiding judge charged the jury fully as to the duty resting upon a person attempting to cross a railroad track.

It is the judgment of this court that the judgment of the circuit court be affirmed.

ROUSE *v.* MICHIGAN UNITED RYS. CO.

(Supreme Court of Michigan, Sept. 21, 1909.)

[122 N. W. Rep. 532.]

Trial—Instructions—Construction.—A charge should be considered as a whole, and not be judged by paragraphs separated from the context.

Appeal and Error—Objections Below—Necessity—Instructions.—While the trial court need not give requests the substance of which is contained in the general charge, the refusal to give any requests which should be given, and omitting the proposition of law entirely from the charge, may be questioned by assignments of error, and, where the proposition omitted is essential to the submission of the theory of either party, error may be assigned to the charge under the statute, even if the attention of the court was not specifically called to the matter.

Street Railroads—Injury to Person Crossing Track—Contributory Negligence.*—One who, knowing that a street car was following him suddenly turned his team and attempted to cross the track in front of the car when it was about 40 feet distant, was guilty of contributory negligence.

Street Railroads—Injuries to Person Crossing Track—Contributory Negligence.†—Under the rule that plaintiff cannot recover if his negligence contributed to the injury, even though defendant's act was in violation of law, one guilty of contributory negligence cannot recover for injuries through being struck by a street car while attempting to cross the track, though the car was running faster than permitted by a city ordinance.

Error to Circuit Court, Ingham County; Howard Weist, Judge.

Action by Albert Rouse against the Michigan United Railways Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

*See first foot-note of *Keefe v. Seattle Elec. Co.* (Wash.), 33 R. R. 725, 56 Am. & Eng. R. Cas., N. S., 725; first foot-note of *Birmingham, etc., Co. v. McLain* (Ala.), 33 R. R. 463, 56 Am. & Eng. R. Cas., N. S., 463; eighth head-note of *Kinlen v. Metropolitan St. Ry. Co.* (Mo.), 32 R. R. 722, 55 Am. & Eng. R. Cas., N. S., 722; second head-note of *Rundgren v. Boston, etc., Ry. Co.* (Mass.), 32 R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685; sixth head-note of *Grimm v. Milwaukee, etc., Co.* (Wis.), 32 R. R. 665, 55 Am. & Eng. R. Cas., N. S., 665.

†See last paragraph of foot-note of *Butler v. Rhode Island Co.* (R. I.), 28 R. R. 322, 51 Am. & Eng. R. Cas., N. S., 322; last paragraph of second foot-note of *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508.

Rouse v. Michigan United Rys. Co

Argued before OSTRANDER, HOOKER, MOORE, McALVAY, and BROOKE, JJ.

Sanford W. Ladd, for appellant.

Frank L. Dodge (*R. H. Person*, of counsel), for appellee.

McALVAY, J. Plaintiff was injured while crossing the street railway track of defendant in the city of Lansing in March, 1907. He claims that this occurred on account of the negligence of the servants of defendant. He was a farmer, and came into North Lansing on the forenoon of the day of the accident, where he stopped for some time, and then proceeded west on Franklin street, turning south when he reached Washington avenue, driving on the east side of defendant's tracks, which are laid in the middle of that avenue. He was driving a team of horses hitched to a wide-tired wagon, with a rack box 16 feet in length containing chicken crates. He proceeded on Washington avenue until he reached Madison street, which intersects it at right angles, where he attempted to cross the track by turning to the west into Madison street. A street car was following him going in the same direction, i. e., south. He knew this, having seen it some time before he turned to cross. He claims that at the time he turned the car was more than a block distant. In crossing the wagon was struck and plaintiff was injured. He charges negligence in that the car was run at a high rate of speed without caution or care for plaintiff's safety, and in not bringing the car under control in time to avoid a collision. There is a dispute as to the distance of the car away at the time plaintiff made his observation before he began to make the crossing, and also as to the place where he attempted to cross; plaintiff claiming that he started to turn at the north crosswalk of Madison street, and the defendant that this occurred at or south of the south crosswalk of Madison street. There is also a dispute as to the time of day the accident occurred and the speed of the car. The claim of defendant was: That plaintiff was driving along on this avenue at a proper distance from the track, and when he got to the south crosswalk of Madison street he turned his team abruptly to cross the track, when the car of defendant was so near that an accident was unavoidable; that the car was operated with care, and not at a high rate of speed; that the contributory negligence of the plaintiff was the cause of his injury. The jury under the charge of the court returned a substantial verdict for plaintiff. This court is asked to reverse the judgment entered upon such verdict upon errors claimed to have been committed upon the trial. Of the errors assigned, but one will require consideration. It is claimed by defendant that the court erred in charging the jury upon the question of the contributory negligence of plaintiff and in refusing to charge as requested upon that subject.

The following excerpts from the charge give the claims of the

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parties in the case and the issue involved as stated by the court: "He claims that before he turned to cross the track he looked to see where the cars were, and saw one back of him just north of Jefferson street approaching Madison street, that would be approaching in his direction. It is his claim that the car was being run at a high and prohibited rate of speed, and because of that fact, before he got across the track, it struck his wagon and caused his injury. The defendant claims that the car was not running at an excessive or prohibited rate of speed, and that the accident was caused by plaintiff carelessly turning to cross the track so near the car that it was not possible for the motorman to stop the car in time to avert the accident. (3) The issue in this case is not complicated; in fact, it is very narrow. There is no proof that the motorman in charge of the car was incompetent, or that the brake or appliances on the car for stopping the car or arresting its action was insufficient or faulty. Therefore the question submitted to you and for you to determine from the evidence is: How, in broad daylight, with a competent motorman with a car fitted with proper appliances, did this accident happen? Was it because of the failure of the motorman, after he in fact observed, or should have observed, had he been paying attention to his duty, the plaintiff upon the track at a point where had he taken proper precaution he could have averted the accident by bringing his car to a stop, or was it because the plaintiff turned across the track when the car was so near that it was not possible for the motorman to arrest the progress of his car and avert the accident? * * * The plaintiff claims the defendant was negligent in running its car at a high rate of speed, a prohibited rate of speed, and running it upon him when the motorman should and could have discovered his position on the track in time to have averted the accident, had he exercised ordinary prudence in running the car."

The portions of the charge of the court upon the question of contributory negligence complained of by defendant are as follows: "If, on the other hand, the plaintiff turned to cross the track at a point and place so near the approaching car that it was not possible, after his peril became known to the motorman, or should have been known to him, by the exercise of ordinary care and prudence, and the motorman used all the means at his command to arrest the progress of the car and avert the accident, and could not have averted the accident, had the car been running within the speed limit of 16 miles per hour, then the plaintiff's want of care and the defendant's exercise of ordinary care defeats the plaintiff's action, and in such event your verdict will be for the defendant. * * * A violation of this ordinance by the railway company of itself does not give the plaintiff a right of action; but the plaintiff in attempting to cross the track, if he knew at the time from former observation the rate of speed

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of the cars, had a right to assume that the car he saw coming was not exceeding the lawful speed. * * * If he was acting as a person of ordinary care and prudence, what caused the accident? Was it because the car was being propelled at an excessive and unlawful rate of speed? Was it because the motorman failed to make the observation he should make to see whether the track was clear? If the motorman had observed, would he have discovered the position of the plaintiff on the track in time, had the car been propelled at the legal rate of speed, to have stopped his car and have averted the accident? These are issues for the plaintiff in this case to establish by a preponderance of the evidence. Was the accident caused by the plaintiff turning upon the track in front of a car near to him, so near that, had it been propelled at a legal rate of speed, the motorman could not have prevented the accident by the exercise of care? If you find such to be the fact, then the plaintiff cannot recover." Defendant's position is, as his requests to charge show, that the court should have charged that, if the jury found plaintiff guilty of contributory negligence, then the verdict should be for defendant, even if the car was running at a rate exceeding the speed limit; in other words, that if, in this case, plaintiff was guilty of contributory negligence, he could not recover.

The rule is well established that a charge should be considered as a whole, and not judged by paragraphs separated from the context, and plaintiff claims that the application of this reasonable rule shows that the court was not in error in his charge upon contributory negligence. Applying this rule, we find that the charge nowhere contains an instruction to the jury such as defendant urges should have been given as above stated. If defendant is right, the court was in error. There can be no doubt but that the several requests of defendant gave the court to understand its position upon the question of contributory negligence, and sufficiently called attention to what it claimed was the law upon that subject in this case. The trial court need not give requests the substance of which is contained in his general charge; but the refusal to give any requests which should be given, and omitting the proposition of law entirely from the charge, may be questioned by assignments of error, and, where the proposition of law omitted is essential to the submission of the theory of either party, error may be assigned to the charge under the statute, even if the attention of the court has not been specifically called to the matter.

In his charge the court in each instance qualified the effect of contributory negligence as defeating recovery upon the condition that the speed of the car did not exceed the ordinance limit. In this he was in error. The testimony of defendant's witnesses tended to prove that plaintiff suddenly, when the car was but a short distance away, turned his team from a place of

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safety to cross the track in front of this car, which he had seen and knew was following him, that the distance from the car was about 40 feet, and that warnings were given and the car stopped as soon as possible. Defendant was entitled to a charge that, if this was true, plaintiff would be guilty of contributory negligence. The question of contributory negligence in this case was one of fact and not of law. "The universal rule is that, if negligence on the part of the person injured contributed to the injury, he is not entitled to recover." 29 Cyc. 507. This rule has been applied in this state, and this court has held that if plaintiff is negligent he cannot recover, unless the negligence of the defendant complained of was wanton or willful. The weight of authority is that if plaintiff's negligence contributed to the injury, though the act of the defendant is in violation of the law, the plaintiff cannot recover. Beach on Contrib. Neg. (3d Ed. Rev.) § 49, notes and cases cited. The court was in error in omitting from his charge as given to state that plaintiff could not recover if guilty of contributory negligence, even if the car was running faster than permitted by the ordinance.

The judgment is reversed, and a new trial ordered.

 NORTH ALABAMA TRACTION CO. v. THOMAS.

(Supreme Court of Alabama, Dec. 16, 1909.)

[51 S. E. Rep. 418.]

Exceptions, Bill of—Alteration.—Where a bill of exceptions was entitled, "Henry Thomas, by A. J. Thomas, His Next Friend," the fact that the initials "A. J." were inserted in the caption after the bill was signed by the judge was not a material alteration; the bill, when signed, reciting plaintiff's testimony that he was 17 years old and that A. J. Thomas, his next friend, was his father.

Street Railroads—Injuries to Travelers—Willfulness.—In an action for injuries by plaintiff, who was thrown from a buggy by the horse becoming frightened at defendant's street car, evidence held to raise the issue of wanton misconduct on the part of defendant's motorman.

Street Railroads—Frightening Horses—Question for Jury.—Where defendant's motorman admitted seeing the horse and the buggy in which plaintiff was riding, but denied that the horse showed signs of fright, or that he was running away because of the motorman's continuous sounding of the gong as he approached the horse, whether the conditions were such as to indicate that the horse was frightened and unmanageable when the motorman saw him was for the jury.

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Negligence—Imputed Negligence—Driver of Vehicle.*—Where plaintiff, when injured, was riding in a buggy at the invitation of the proprietor, who had entire charge of the horse and buggy, the driver's negligence, if any, could not be imputed to plaintiff.

Appeal and Error—Harmless Error—Instructions—Error Cured by Verdict.—Failure to limit the jury's verdict to the amount demanded in the complaint was cured by a verdict for a sum much less than that demanded.

Street Railroads—Cars—Operation—Sounding Gong.—It was the duty of the motorman of a street car to cease sounding the gong, and, if need be, to stop the car, if practicable, and to use all precautions to allay the fright of a horse being driven on the street in front of the car, on discovering that the horse was becoming unmanageable because of his fright of the car.

Trial—Requested Charge—Instructions Given.—It is not error to deny a requested charge covered by instructions given.

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Henry Thomas, pro ami, against the North Alabama Traction Company, for damages received in a runaway accident alleged to have been occasioned by the negligent running of defendant's cars. Judgment for plaintiff, and defendant appeals. Affirmed.

Motion was made to strike the bill of exceptions, because of the initials "A. J.," before the word "Thomas," which last appeared in the styling of the plaintiff, and which constitutes the initials of the plaintiff's next friend. The facts seem to be that plaintiff was riding along the streets in a buggy drawn by a horse owned and driven by one Kenyon Glenn, and that one of defendant's cars approached the buggy from the rear, and the horse became frightened at the approach of the car and the sounding of the gong thereon, and that, observing this condition, the gong was continued to be sounded and the car propelled towards the horse, causing the horse to become unmanageable and to run away, producing the injuries complained of.

The following charges were given at plaintiff's requests: (2) "I charge you that the negligence of the driver, Kenyon Glenn, if you find he was negligent, cannot be imputed to the plaintiff, Henry Thomas, and cannot bar his recovery in this case, if you find said plaintiff was not guilty of negligence." (8) "If you find from the evidence that plaintiff is entitled to recover in this case, you may award him such damages as will be a fair equiva-

*See first foot-note of *Mittelsdorfer v. West Jersey & S. R. Co.* (N. J.), 33 R. R. R. 494, 56 Am. & Eng. R. Cas., N. S., 494; foot-note of *Gulf, etc., R. Co. v. Barnes* (Miss.), 32 R. R. R. 620, 55 Am. & Eng. R. Cas., N. S., 620; first head-note of *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311.

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lent in money for the mental and physical pain that plaintiff suffered, or that is reasonably certain he may have endured, if any, and a fair equivalent for the permanent impairment of his ability to perform the ordinary duties of life as a natural result of the injuries complained of." Charge Y, referred to, is as follows: "If you believe from the evidence that the proximate cause of the injury to plaintiff was the negligence of Kenyon Glenn, then your verdict should be for the defendant."

John C. Eyster and Tennis Tidwell, for appellant.
Wert & Lynn, for appellee.

ANDERSON, J. Whether the initials were or were not inserted before the name of "Thomas," the next friend, in the caption of the bill of exceptions, after it was signed by the presiding judge, there was no material alteration of same. The bill of exceptions recited when signed: "I am 17 years of age. A. J. Thomas, my next friend in this suit, is my father." (Plaintiff's testimony in transcript, page 20.) The motion to strike the bill of exceptions is overruled.

Counsel for appellant insists that the fourth count of the complaint charges the defendant's servants with wanton or willful misconduct, and that there was no proof of same, and that the court erred in refusing the general charge as to said count. We concede the correctness of the contention that the fourth count does charge wanton or willful misconduct, but do not agree that there was no proof in support of the charge, and think that the trial court properly submitted the question to the jury.

The plaintiff's evidence showed that the horse was frightened and exhibited many signs that he was trying to run away, and the jury could well infer that the defendant's servant in charge of the car, when sounding the gong and causing the car to proceed, was conscious of the plaintiff's peril, and that his acts and conduct were calculated to increase the same. Holmes, the motorman, admitted seeing the horse and buggy, but denied that the horse was showing signs of fright, or that he was running away. It was for the jury, however, to determine whether or not the conditions were such as to indicate that the horse was frightened and unmanageable when Holmes saw him.

Counsel for appellant concedes that charge 2, given for the plaintiff, asserts the law, but insists that the giving of same was error, because it assumed that plaintiff had no control over the driver. The undisputed evidence showed that the plaintiff was merely riding in the buggy, upon the invitation of Glenn, the proprietor, and who had entire control of the horse and buggy, and that plaintiff had no control over the said Glenn.

We need not determine whether or not there was error in giving charge 8, as the defect argued by counsel was cured by the

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verdict, which was for a sum greatly less than the amount claimed in the complaint. This charge, unlike the one in the case of *Alley v. Daniel*, 75 Ala. 403, set out the elements of damages, and, while it did not confine the damages to the amount claimed, the verdict cured this omission; it being for less than the sum claimed in the complaint.

The other insistences of error are very general, as counsel merely argues the subject and refers to charges covered by the proposition, leaving us to separate and designate such charges as to which the argument may be applicable. We will say, however, that the charges invoking the principle argued were properly refused. Whether it was the duty of the motorman to sound the gong at crossings, and whether it is or is not negligence when horses are frightened by said sounding, we need not decide as to cases where there was no knowledge of peril. The facts in this case afford an inference that the plaintiff was in peril and that this fact was known to the motorman. If such was the case, it was not only the duty of the motorman to cease sounding the gong, but to stop the car, if practicable, and to use all precautions to allay the fright of the animal.

The trial court did not commit reversible error in refusing certain charges, requested by the defendant, exonerating it from liability on account of the negligence of Glenn, as these charges were, in effect, duplicated by given charges. See charge Y given for the defendant.

The judgment of the law and equity court is affirmed.
Affirmed.

MCCLELLAN, MAYFIELD, and SAYRE, JJ., concur

INGALLS *v.* LEXINGTON & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, Feb. 21, 1910.)

[90 N. E. Rep. 1154.]

Negligence—Imputed Negligence.*—Where plaintiff was riding on an express wagon by the driver's invitation or consent, the latter's negligence in operating the wagon could not be imputed to plaintiff.

Negligence—Contributory Negligence.†—While one riding on a wagon by invitation of the driver was bound to exercise due care for his own safety, and warn the driver of any danger he observed of colliding with a street car, or otherwise, of which he thought the driver was ignorant, he was not bound to inform him of dangers of which the driver seemed to know.

Street Railroads—Injuries—Actions—Jury Question—Contributory Negligence.—In an action against a street railroad company for injuries by colliding with a wagon upon which plaintiff was riding by the driver's invitation or consent, whether plaintiff failed to exercise due care held for the jury.

Report from Superior Court, Middlesex County; Robert O. Harris, Judge.

Action by Frank H. Ingalls against the Lexington & Boston Street Railway Company. Verdict directed for defendant, and plaintiff excepted. Exceptions sustained.

H. N. Allin, B. E. Kemp, and Burke, for plaintiff.

C. A. Hight and T. B. Hughes, for defendant.

KNOWLTON, C. J. This is an action to recover for injuries received by the plaintiff from a collision of the defendant's street railway car with a wagon on which he was riding. There was evidence of negligence on the part of the defendant's motorman in running the car at an excessive rate of speed, and perhaps in other particulars, leaving, as the only issue now before the court, the question whether there was evidence that the plaintiff was in the exercise of due care. The accident happened at half past 7 o'clock in the evening of October 31st, while the plaintiff was riding, by the invitation or with the consent of the driver, upon a large express wagon, drawn by two horses and heavily loaded with merchandise high above the heads of its occupants. The plaintiff's relations to the driver were such that the driver's neg-

*See foot-note of preceding case.

†See second foot-note of *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311; last foot-note of *Mittelsdorfer v. West Jersey & S. R. Co.* (N. J.), 33 R. R. R. 494, 56 Am. & Eng. R. Cas., N. S., 494.

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ligence cannot be imputed to him. Shultz v. Old Colony Street Railway Company, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502. The railway was but a single track nearly in the center of the street. The express wagon was driven out from a store on the easterly side of the street, on a descending grade on the westward, at right angles to the street and across the track to the westerly side, because that was a safer and easier way to go with the high load than to turn sharply to the right in coming from the store. The driver proceeded for about 300 feet to the northward, on the left-hand side of the track, and then turned to the right, and was going with the wheels on the right-hand side of the wagon and with the off horse between the rails, and the wheels on the left-hand side outside of the track, westerly of the westerly rail. After proceeding a short distance in this course, the defendant's car was seen coming from the north on a descending grade, and the driver turned diagonally to the right to get the wagon off the track; but the forward wheel on the left-hand side of the wagon was struck by the car, and the plaintiff was injured. The driver, when he saw the car, urged his horses by striking them with the rein, having no whip. The plaintiff was familiar with the place, but he said nothing to the driver until the car was very near them, when he said, "My God, Dwyer, he is going to hit us." The driver, too, was entirely familiar with the neighborhood. There was evidence that the car was going at the rate of 30 to 35 miles an hour, although this was contradicted.

It well might have been found that the driver was not in the exercise of due care. Perhaps it could be said that there was no evidence of his due care, although this we do not determine. However this may be, the position of the plaintiff was very different. He was not primarily responsible for the driving of the horses and the position of the team in the street. He was a mere invited guest of the driver. He could well trust something to the care and experience of the driver and his supposed qualifications for his position. Indeed, occupants of wagons and carriages are often so situated as to be obliged to trust everything to the driver of the vehicle in which they are riding. It would have been an impertinence for the plaintiff to volunteer suggestions to the driver as to the method of driving, in the absence of some important reason for so doing. While it was his duty to exercise due care for his own safety, and while he should have warned the driver of any danger that he observed, if he thought the driver was ignorant of it, and should have done anything else that was reasonably necessary for his own protection, he was not called upon to inform the driver of dangers which the driver seemed to know. He testified that when he first saw the approaching car, the driver indicated by his conduct that he also saw it and was attempting to get out of the way of it.

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We are of opinion that, upon the whole evidence, it was a question for the jury whether the plaintiff failed to do anything for his protection that the exercise of due care required him to do. *Peabody v. Haverhill, Georgetown & Danvers Street Railway*, 200 Mass. 277, 85 N. E. 1051; *Chadbourne v. Springfield Street Railway*, 199 Mass. 574, 85 N. E. 737; *Tennien v. Chase*, 201 Mass. 497, 87 N. E. 901; *Miller v. Boston & Northern Street Railway*, 197 Mass. 535, 83 N. E. 990.

Exceptions sustained.

MAYFIELD v. SOUTHERN RY. CO., CAROLINA DIVISION.

(Supreme Court of South Carolina, March 7, 1910.)

[67 S. E. Rep. 132.]

Evidence—Best Evidence.—It was error to permit a witness to testify that certain personal property and real estate had been transferred by him by deed; the writing being the best evidence.

Railroads—Fires—Exemption from Liability.*—A provision in a contract between the owner of a cotton gin and a railroad for the construction of a spur track to the gin, exempting the railroad from liability for loss of the plant or damage thereto by fire, communicated by locomotives, was valid, though the gin was situated beyond the limits of the right of way.

Railroads—Fires—Exemption from Liability.—A contract between the owner of a cotton gin and a railroad for the construction of a spur track to the gin exempted the railroad from liability for loss by fire communicated by locomotives of the railroad. Held, that the exemption embraced fires communicated from its main line.

Appeal from Common Pleas Circuit Court of Bamberg County;
R. C. Watts, Judge.

Action by Mrs. Leda K. Mayfield against the Southern Railway Company, Carolina Division. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. F. Carter, T. M. Raysor, and B. L. Abney, for appellant.
R. C. Holman and S. G. Mayfield, for respondent.

WOODS, J. The plaintiff, Leda K. Mayfield, secured a judgment against the defendant, Southern Railway, Carolina Division, for loss by fire of a ginhouse, seedhouse, and gins and other

*See first foot-note of *Hutto v. Seaboard Air Line Ry.* (S. Car.), 32 R. R. R. 78, 55 Am. & Eng. R. Cas., N. S., 78; foot-note of *German-American Ins. Co. v. Southern Ry. Co.* (S. Car.) 28 R. R. R. 611, 51 Am. & Eng. R. Cas., N. S., 611.

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machinery, under the allegation of the complaint that the property was set on fire by sparks emitted from one of the defendant's engines. The exceptions are numerous, but it was admitted at the argument that only two errors are assigned, one in the admission of evidence and the other in the charge.

The main issues were: First. Was the plaintiff the sole owner of the property, or did she and her husband own it jointly? Second. Was the plaintiff bound by a written contract signed by S. G. Mayfield, her husband, and the defendant, which was set up in defense as a contract exempting the defendant from liability for fire. Third. If the plaintiff was bound, was the contract effectual to defeat her recovery.

On the 10th of February, 1906, Leda K. Mayfield and S. G. Mayfield executed a deed conveying to the defendant a right of way for a spur track to be run from defendant's main line to the industrial plant, for the burning of which this suit was brought. The right of way conveyed is described in the deed as being over and upon the lands of the grantors; and the consideration expressed in the deed was "the advantage to be by them derived from the operation of the hereinafter described track." On the same day the husband, S. G. Mayfield, in his own name, made a contract with the railroad company for the construction of the industrial track, which provided, among other things, that the railroad company should "maintain and operate the same for the purpose of affording unto the party of the second part (S. G. Mayfield) facilities for the shipment of his freights over the lines of the railway company and its connections." In addition to these recitals that the land belonged to Mr. and Mrs. Mayfield jointly and that the industrial plant which was to be served by the spur track belonged to S. G. Mayfield, the documentary evidence as well as the testimony of Mr. Mayfield showed that the machinery had been bought by the husband and wife together. In these circumstances, it was error to allow the witness S. G. Mayfield to testify that his interest in the property had been transferred to Mrs. Mayfield by deed executed in 1906. It is true, as said by the circuit judge, that a writing is not necessary to pass the title to personal property, but, when the parties to a sale of such property choose to put their contract in writing, that is the best evidence of its existence and of its terms. Had the witness said that he had sold the personal property to his wife without a writing, then by cross-examination the test could have been applied as to whether the acts necessary to pass the title without writing had actually been done. But, when the witness testified that there was a writing in existence, the writing took the place of any other method of making the transfer and spoke for itself; and the mere verbal statement of the witness as to its effect was inadmissible. The plaintiff and the witness on the 10th of February, 1906, had represented in their deed that the

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land belonged to both of them, and the witness had on the same day represented in his contract that the industrial plant belonged to him. It was therefore of primary importance to the defendant that the writing evidencing the acquisition of the entire title by Mrs. Mayfield should be produced, so that its terms and its date should appear. The terms of the paper and its date would have a very manifest bearing on the first two issues above stated, namely, whether the plaintiff was the sole owner of the property and entitled to recover for its full value, and whether she was bound by the contract of exemption signed by her husband. The verbal statement as to the transfer was clearly inadmissible for the additional reason that a large part of the property destroyed by the fire consisted of real estate which could not be conveyed by parol.

The next inquiry is whether the circuit judge erred in his construction of the clause of the contract providing for exemption from liability for destruction of the buildings used in connection with the business served by the industrial track and their contents. The exemption clause is as follows: "That he (S. G. Mayfield) will indemnify and save harmless the railway company against all and any damage resulting from negligence of the party of the second part, his servants and employees, in and about said industrial track and the right of way therefor; and, furthermore, against any and all claims, demands, suits, judgments, and sums of money accruing for loss or damage by fire communicated by locomotive engines or trains of the railway company to buildings used by the party of the second part in connection with the business served by said industrial track, or to the contents of such buildings, or to other property stored by or with the consent of the party of the second part upon or near said industrial track. The railway company hereby stipulates for this protection as a condition of its agreement, herein expressed, to afford the above-described terminal services and facilities to the party of the second part elsewhere than at its regular station." The validity of such contracts has been so completely established by an unbroken current of judicial authority that the familiar and convincing reasoning on the subject need not be again set out. In asserting their validity, Mr. Justice Jones for the court tersely stated the argument and cited the authorities in *German-American Ins. Co. v. Southern Ry. Co.*, 77 S. C. 467, 58 S. E. 337. It makes no difference that the industrial plant to which the contract relates may be situated beyond the limits of the railroad right of way. The owner of the plant has no right and can acquire none except by contract to require the railroad company to build a spur track to his plant. *Mays v. Seaboard A. L. Ry. Co.*, 75 S. C. 455, 56 S. E. 30. It follows that as a condition of furnishing this convenience the railroad company may exact any condition it sees fit not for-

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bidden by public policy. As already pointed out, the condition that the railroad company shall be exempt from liability for loss of the plant by fire communicated by its locomotive engines is not forbidden by public policy; and therefore this contract must be held valid without respect to the location of the plant. The precise point was decided in accordance with this conclusion by the Supreme Court of Texas in *M., K. & T. Ry. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159.

While not denying the validity of the contract, the circuit judge limited its effect by charging: "That under that (agreement) even should you find that Mr. Mayfield was the agent of Mrs. Mayfield, and she is bound by his acts, yet that would not prevent Mrs. Mayfield from recovering here against the railroad company, if this fire originated from its main line, or anywhere else other than on the side track." The exemption which the parties saw fit to express in their contract was "for loss or damage by fire communicated by locomotive engines or trains of the railway company to buildings," etc. It would have been difficult to use broader or more comprehensive language, covering fires communicated by any locomotive or train, whether on the main track or on the spur track. The court cannot insert in the contract restrictive words which the parties saw fit to omit, unless such words be inserted, there is no escape from holding the exemption to embrace fires communicated by the defendant's locomotives wherever they may be. The circuit judge was therefore in error in charging the jury that the contract of exemption had no application to fires communicated by the defendant's locomotives while on its main track. The Supreme Court of Rhode Island reached the same conclusion as to a similar case in *Richmond v. N. Y., etc., Ry. Co.*, 26 R. I. 225, 58 Atl. 767.

In view of these conclusions, it seems hardly probable that any question will arise on the next trial as to the limits of the right of way. However, it may be well to remark that the court has laid down in *So. Ry. Co. v. Beaudrot*, 63 S. C. 266, 41 S. E. 299, and *So. Ry. Co. v. Gossett*, 79 S. C. 372, 60 S. E. 956, what is necessary to prove the legal right to hold any portion of a right of way by adverse possession.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

ERIE R. CO. *v.* SCHOMER.

(Circuit Court of Appeals, Sixth Circuit, July 13, 1909.)

[171 Fed. Rep. 798.]

Trial—Instructions.—Plaintiff, a switchman, having been injured because of an alleged negligent defect in a coal car, the court charged that Rev. St. Ohio, § 3365-21, made proof of an injury to an employee by reason of a defective car, or attachment thereto, prima facie evidence of negligence; there being a statutory presumption, from an injury to an employee due to such defect, that the company had knowledge thereof before and at the time of the injury. The court had previously explained that the statute raised a presumption of negligence from evidence of an injury from a defect, and that it devolved on defendant to introduce proof to remove the effect of the presumption, and also that under such circumstances defendant would be bound to offer testimony to excuse the presumption of negligence which would arise from that proof to an extent sufficient to remove the effect of such presumption. Held, that there was no affirmative error in such charge, in the absence of a request for more specific instruction as to the degree of proof necessary to counterbalance the presumption.

Master and Servant—Injuries to Servant—Railroads—Defective Cars—Inspection—Instructions.—Where a switchman was injured by an alleged defect in a coal car, and there was a statutory presumption of negligence, which the railroad company sought to rebut by proof of recent inspection, an instruction that defendant was not a guarantor of the safety of attachments on its cars, and that if the inspection was suitably and properly made, and the defect did not appear, and did not exist at the time, then defendant used ordinary care, but the mere fact that it had suitable inspectors and that they inspected did not of necessity establish that the car was properly inspected, it being for the jury to say whether the presumption that the car was defective at the time of the accident had been removed by evidence of the kind, extent, and time of the inspection, was a sufficient charge on that subject.

Master and Servant—Injuries to Servant—Railroads—Duty of Inspection.*—A railroad company is bound to exercise ordinary care in inspecting its cars to ascertain the presence of defects dangerous to employees.

Master and Servant—Injuries to Servant—Railroads—Inspection—Nondelegable Duty.†—Negligence of a railroad car inspector is the

*See last foot-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618.

†See last foot-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618.

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negligence of the railroad company; the duty to inspect being non-delegable.

Master and Servant—Injuries to Servant—Railroads—Inspection—Question for Jury.—In an action for injuries to a railroad switchman by an alleged defect in a coal car, whether an inspection of the car prior to the accident, which had not disclosed the defect, had been ordinarily careful, was for the jury.

Trial—Instructions—Limitation of Evidence.—Where, in an action for injuries to a servant by an alleged defect in a coal car, there was other evidence than the testimony of Z. bearing on the sufficiency of a prior inspection in which the defect was not discovered, a request that, if the jury believed Z.'s evidence concerning such inspection, they should return the verdict for the defendant, was properly refused.

Master and Servant—Injuries to Servant—Railroads—Contributory Negligence.—Where plaintiff, a switchman, was injured by an alleged defect in a coal car while attempting to cross the front end of the car, on which there was no platform or end sill, to signal the engineer to stop instantly, whether plaintiff was negligent in endeavoring to so cross, instead of adopting some other practical and safe method, was for the jury.

Master and Servant—Injuries to Servant—Action—Emergency—Instructions.†—Where, in an action for injuries to a switchman by an alleged defect in a coal car, as he was crossing the front of the car, there was some evidence to show reason for quick action, and also evidence that the way he took was proper, the court properly charged that if plaintiff, apprehending threatened danger, or conceiving necessity for unusually quick action, selected one of two ways that was not as safe as the other, the jury, in determining whether he was negligent, should consider the emergency, if any, and the kind of conduct demanded of plaintiff under the circumstances.

Master and Servant—Injuries to Servant—Contributory Negligence—Proximate Cause.‡—Plaintiff, a switchman, threw the wrong switch, and, seeing the train was about to back on the wrong track, attempted to signal the fireman to stop instantly. Being unable to do so, he attempted to cross the front end of a coal car to the engineer's side to signal him, and in doing so caught hold of a defective tie rod, which he mistook for a grab iron, and was precipitated to the track and injured.

†See last foot-note of *Rundgren v. Boston & N. St. Ry. Co.* (Mass.), 32 R. R. R. 685, 55 Am. & Eng. R. Cas., N. S., 685; sixth head-note of *Chesapeake & C. Ry. Co. v. Hall* (Va.), 32 R. R. R. 638, 55 Am. & Eng. R. Cas., N. S., 638; eighth head-note of *Colorado Midland Ry. Co. v. Brady* (Colo.), 32 R. R. R. 113, 55 Am. & Eng. R. Cas., N. S., 113; last foot-note of *Kern v. Des Moines City Ry. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

‡See last foot-note of *Bloom v. Sioux City Traction Co.* (Iowa), 33 R. R. R. 784, 56 Am. & Eng. R. Cas., N. S., 784; last foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; last foot-note of *Williams v. Atlantic Coast Line R. Co.* (Fla.), 33 R. R. R. 158, 56 Am. & Eng. R. Cas., N. S., 158.

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Held, that plaintiff's mistake in throwing the wrong switch was the remote and not the proximate cause of the injury, and hence such mistake did not deprive him of the right to have his act in crossing the car considered on the question of contributory negligence, with reference to the emergency then existing for immediate action.

Evidence—Conclusions.—A statement of a witness, referring to plaintiff at the time of the injury, "I judge he got scared when the trestle got so high as to make him think he might get side-wiped with the trestle," was properly excluded as an opinion.

Appeal and Error—Reception of Evidence—Objections.—Objections to evidence, failing to point out the ground of objection, afford no basis for an assignment of error.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

W. E. Cushing, for plaintiff in error.

G. M. Skiles and *R. B. Newcomb*, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. Action for personal injuries sustained while in the service of the Erie Railroad Company as a yard switchman. Jury, and judgment for plaintiff. There was evidence tending to show that plaintiff was one of a switching crew engaged in the switching of two loaded coal cars from the track upon a coal tipple to an adjacent surface track. It was a dark night. Plaintiff, though an experienced switchman, was not familiar with the tipple or tracks adjacent. He was directed to take two cars down the tipple track, "throw the switch, and put them on the middle rails." He gave the necessary signal for backing, and then mounted on the forward corner step or stirrup on the forward car, on the fireman's side of the engine. What happened, as told by the plaintiff, was as follows.

"(2) Describe what happened. A. As soon as I got on the car was sort of backing up, and as soon as I got on the stirrup I seen I wasn't going up the right incline. I was going on what they call the surface track, and tried to swing the fireman down; and the cars didn't slack up, and they didn't seem to take my signal, and I thought maybe the fireman wasn't able to see me, or wasn't there. So I swung around on the ladder end of the car and took hold of the top, or the next to the top, round with my left hand, and put my right foot over on the deadwood, and reached over with my right hand to take hold of the grab iron, and as soon as I did I let go with my left hand and lost my balance. Something gave way with me, and I fell over backward, and that is the last I remember. Q. Do you remember what gave way? A. I suppose the handhold gave way with me. I don't know; only what I heard since. Q. Where was your lantern? A. On my left arm. Q. Where were you going? A. To

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the opposite side of the car to swing the engineer down. I knew the engineer would have his head out of the window. Q. Was that the proper way for you to go? (Objected to; overruled; exception.) A. Yes, sir."

Other evidence tended to show that he did not take hold of the grab iron, which was about the center of the end of the car, but of the loose end of an iron tie rod of about the size of the grab iron. This gave way, and he fell between the rails, and in front of the moving car upon which he was standing. It further appeared that inside of such coal cars there is an iron brace rod which runs across the car to support the sides of the car against pressure from the load. One end of this brace rod had broken loose, and the loose end was hanging in looped shape over the end of the car; the loop end forming something of a handle just above the handhold which the plaintiff supposed he had hold of. The negligence of the railroad company was in the presence of this looped broken tie rod, hanging over the end of the car in a situation likely to deceive a brakeman endeavoring to support himself, especially in the dark, upon the grab iron, and so the jury was instructed.

This action was predicated upon section 3365-21, Rev. St. Ohio, which makes proof of an injury to an employee by reason of any defective car or "attachment thereto" prima facie evidence of negligence; there being a statutory presumption from an injury due to such defect to an employee that the company had knowledge before and at the time of the injury. It is not plain just what is deemed the error in the instruction of the court in respect of this statutory presumption of negligence. In the brief, counsel seem to lay stress upon the fact that the court said that, if the jury was satisfied that the accident happened substantially as the plaintiff claimed it did, the defendant was negligent. But this must be taken with its context. The court had before explained that the Ohio statute raised a presumption of negligence from evidence of an injury from a defect, and that it would devolve "upon the defendant to introduce proof to remove the effect of that presumption of negligence arising out of that fact." He also followed the statement particularly complained of by saying:

"Because then we have the case where an accident happened and injury resulted in consequence of a defective attachment of a car operated by the defendant, or of a defect in a car operated by the defendant, and the result would be that the defendant would have to offer testimony to excuse that negligence; that is, that would be the prima facie status of it."

Further explaining, he added:

"A presumption of negligence would arise from that proof, and it would fall upon the defendant to introduce proof to the con-

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trary, to an extent sufficient to remove the effect of that presumption of negligence arising out of that fact."

In *Clunk v. Hocking Valley Railway Company*, 74 Ohio St. 125, 77 N. E. 752, it is said, in reference to this Ohio statute:

"But, while the effect of this statute in the cases to which its provisions apply is to so modify the rules of evidence as to make the proof of such defect prima facie evidence of negligence on the part of the corporation, yet this statute neither changes nor affects the rule as to the quantum or degree of evidence sufficient or necessary to rebut or control the prima facie case thus raised. The general rule would seem to be well established, by an almost unbroken line of authority, that to rebut and destroy a mere prima facie case the party upon whom rests the burden of repelling its effect need only to produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose counterbalance the evidence by which the prima facie case is made out and established. It need not overbalance or outweigh it. *Smith v. Sac. Co.*, 11 Wall. 139, 20 L. Ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Railroad Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403."

This court, in *Toledo, St. L. & W. R. Co. v. Star Flouring Mills Co.*, 146 Fed. 953, 77 C. C. A. 203, and *Shankweiler v. Baltimore & O. Ry. Co.*, 148 Fed. 195, accepted this as a proper interpretation of this statute. There was no affirmative error in what the court did say, and, if the plaintiff in error had desired anything more in reference to the degree of proof which would be sufficient to counterbalance the statutory presumption, there should have been a special request upon that matter. No such request was made.

2. The defendant sought to rebut the presumption of negligence by evidence of recent inspection. There was evidence tending to show that this car had been inspected on the day of the accident, and that the inspectors had not discovered this broken tie rod, and that such a condition, if it had existed when the inspection was made, was one of such obvious character that it could not have escaped observation. From this evidence it was claimed that the defective attachment originated after the inspection, and, if so, was so recent as not to constitute evidence of negligence.

The court, in substance, instructed the jury that the defendant was not a guarantor "of the safety of instrumentalities and the attachments upon its cars." "If," said the court, "that inspection was then suitably and properly made, and this defect did not appear, and did not exist at that time, then I charge you that the defendant used ordinary care. But the mere fact that it had suitable inspectors, and that its inspectors inspected, does not

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carry with it, of necessity, the conclusion that the car was properly inspected. It is for you to say whether or not, upon all of this testimony, the presumption that this car was defective at the time of the accident has been removed by their testimony showing the kind and extent and time of inspection." This was a full, clear, and sufficient charge upon this subject.

Plaintiff in error says that it was error to charge the jury upon the subject at all, that the evidence showed that there had been a proper and reasonable inspection upon the very day of the accident, and that the jury should have been instructed to find that the defendant had done its duty in the matter of inspection. We shall pass by the assignments of error based upon what the court said about the duty of inspection. None of these are good, if the question of whether, under the evidence, there had been a proper and careful inspection of this car, was one for the jury.

There was a request that the court should say to the jury that if they believed the evidence of the witness Zelenak, one of the inspectors at the coal tipple track, whose duty it was to inspect this car, they should return a verdict for the defendant. This required the court to eliminate all other evidence, direct and circumstantial, which bore upon the fact of a proper inspection. If, as the court said to the jury, this broken tie bar hung over the end of this car in proximity to the handhold when this inspection was made, it was negligence not to see it. A proper inspection, as the court said in another place, would have disclosed it. One of two things was plain. Either this condition was brought about after the inspection relied upon, or the inspection was carelessly made.

Against the conclusiveness of the evidence of inspection there were these facts: First, that this witness Zelenak said that he was one of two who inspected together, he on one side of a train of cars and his associate on the other. Was the court to assume that what Zelenak saw or ought to have seen upon one side of the train was all there was to see? Second. Neither Zelenak, nor his colleague, have any recollection of the inspection of this particular car. It was in evidence that they inspected each day, between them, an average of more than 1,000 cars. In such circumstances it was only possible for them to testify as to their practice of marking a car as in bad order, and reporting every such car in a record kept by them, and that this car was not so reported on the record book. As against the inference, from the failure of the inspectors to discover this broken rod, that the condition was a recent one which occurred after the inspection, there was evidence that the broken end of the tie rod indicated from its appearance an old break.

The rule of ordinary care is applicable to this matter of inspection. That rule does not demand an impracticable inspection, such as would unreasonably cripple or embarrass the usual cus-

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tomary operation of a railroad, and an inspection such as usually made by well-regulated railroads will be ordinary care. *I. C. Rd. Co. v. Coughlin*, 132 Fed. 801, 65 C. C. A. 101; *Shankweiler v. B. & O. Rd. Co.*, 148 Fed. 195, 78 C. C. A. 353. But the negligence of an inspector is the negligence of the company, for the duty is one nondelegable. *Felton v. Bullard*, 94 Fed. 781, 37 C. C. A. 1. Having in mind the great number of cars which the inspectors were required to inspect at this point each day, the fact that the inspectors had no memory as to the inspection of this particular car and could rely only upon their usual course of business, and also the evidence of the witness who examined the brace rod which produced the mischief that the break in the rod was an old one, it was not error to submit the question of the reasonableness of the manner of inspection and carefulness with which it was done to the jury for their opinion. For even a stronger reason it was not error to refuse to put the case to the jury upon the credibility of Zelenak and the sufficiency of his evidence alone.

3. Whether the plaintiff was himself in the exercise of due care in endeavoring, as he did, to cross the front end of a coal car, upon which there was no platform or end sill, was a question for the jury. The second request for a special charge, in substance, asked the court to tell the jury that if the plaintiff had two ways of getting into a position to signal the engineer, one of which was practical and comparatively safe, "and the other to pass over the deadwood of the car to the other side, and that such method was a dangerous one, that the choice of the latter would be negligence, barring a recovery in this case." This was a right principle, but not applicable here in the narrow form stated. It ignored the effect of a situation which might leave no time for a comparison of dangers and a choice of means. It was plainly the duty of the plaintiff to stop the backing of these cars out upon a track not intended for such use. He found, after he mounted the corner step of the forward car upon which he rode down from the tipple track, that he had thrown a switch which led out to a storage track. He could not, owing to a curve, fully observe the condition of that track, and says the cars were being shoved down a track upon which "cars were being placed." Acting upon this thought, he adopted the nearest and apparently quickest way of getting over to the engineer's side to signal a stop. Upon this aspect of the case the court told the jury:

"If you find that the plaintiff, at the moment when he conceived it to be his duty to convey a signal to the engineer to instantly stop, apprehended that there was threatened danger, or conceived a necessity for unusually quick and expeditious action, selected of two ways one that was not as safe as the other, you will consider, in determining whether or not he was at that time

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exercising ordinary care for his own safety, what was the emergency, if any, that presented itself to him, and what kind of conduct you have to demand of him under those circumstances."

There was no error in this, for there was evidence tending to show a reason for quick action, as well as some evidence that the way he went was a proper way. But it is urged that, as the mistake made was plaintiff's mistake in throwing the wrong switch, he is not entitled to the benefit of any emergency claim. The mistake was not a culpable one. There was evidence tending to show that this was the first time he had ever done switching work at or near this coal tippie. But that mistake was the remote and not the proximate cause of the injury. The defective attachment was the immediate and proximate cause of his hurt. That was sustained in endeavoring to discharge his duty to the company under the immediate conditions, and not in an endeavor to save himself. He was at the time called upon to do something at his post of duty. The rule of care which was applicable to him at that moment was that which makes reasonable allowance for a sudden call for action, not permitting delay or time for making choice of means.

Certain assignments of error are predicated upon evidence excluded or admitted over objection. One relates to the exclusion of certain parts of an ex parte affidavit made at the instance of an agent of the company getting up such statements shortly after plaintiff's injury. Kieley was a witness for the plaintiff in error, and had been an eye-witness. In this original affidavit it appeared that he had said, referring to the plaintiff at the time he fell:

"That he rode stirrup until he reached the trestle, and, I judge, got scared when trestle got so high as to make him think he might get side-wiped with trestle. He then made a move to corner of car, and his lantern fell, and he was under the car."

The statement, "I judge, got scared," etc., was excluded as a mere opinion. There was no error in this. It was not a statement of fact and the opinion was irrelevant.

The plaintiff was asked if going across the end of the car was the proper way to go. This was objected to. The objection was general, and no reason for the exclusion was given. If the objection had been made to the form of the question, it was good; but in that case it might have been renewed, so as to call for the knowledge of the witness as to the usage or custom. It has been many times decided that objections to evidence which fail to point out the ground of objection afford no basis for the assignment of error in this court. "The ground of the objection," said Judge Day, now Mr. Justice Day, in *Merchants' Insurance Co. v. Buckner*, 110 Fed. 345, 346, 49 C. C. A. 80, and 81, "should be disclosed, in order that the court may act understandingly and correct the error, if one has been made." See, also, *B. & O. Rd. Co. v. Hellenthal*, 88 Fed. 116, 31 C. C. A. 414.

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In *Burton v. Driggs*, 20 Wall. 125, 133, 22 L. Ed. 299, it was said:

"It is a rule of law that when a party excepts to the admission of testimony he is bound to state his objections specifically, and in a proceeding for error he is confined to the objection taken. If he assigns no ground of exception, the mere objection cannot avail him."

This ruling applies to several of the errors assigned. The other assignments relating to evidence have been examined. Many of the matters were within the discretion of the judge, and as such show no such abuse as to constitute reversible error.

The errors assigned, and not specifically referred to, have been considered. It would be idle to deal particularly with them. They are all overruled.

The judgment is accordingly affirmed.

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(Supreme Court of Michigan, March 5, 1910.)

[125 N. W. Rep. 6.]

Master and Servant—Negligence—Appliances—Railroad Torpedoes—Inspection.—Decedent, a railroad brakeman, was killed in a rear-end collision, caused by the failure of torpedoes fastened to the rail to explode when run over by the colliding train. The torpedoes were made by a reputable manufacturer, were in general use by the railroads of the country, and were furnished to the railroad company ready for use; the only manner of determining their efficiency being by actual use on the track. During the 10 or 15 years the company had used torpedoes of that make, none of them had failed to explode, and no instance of their failure to explode when properly fastened was known to the manufacturer. Held, that defendant was not negligent in failing to inspect the torpedoes, the mere possibility that one torpedo out of thousands might have been defectively constructed not being sufficient to show negligence in that respect.

Master and Servant—Master's Duty—Safe Appliances.*—The master is only bound to use reasonable care to furnish safe appliances for the purpose intended, and is not an insurer of their absolute perfection.

Master and Servant—Injuries—Negligence—Presumptions.†—The mere happening of an accident resulting in injury to an employee raises no presumption of negligence of the master.

*See last paragraph of first foot-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; first foot-note of *Booth v. St. Louis, etc., Ry. Co.* (Mo.), 32 R. R. R. 119, 55 Am. & Eng. R. Cas., N. S., 119.

†See foot-note of *Louisville & N. R. Co. v. Caldwell* (Fla.), 33 R. R. R. 560, 56 Am. & Eng. R. Cas., N. S., 560.

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Error to Circuit Court, Shiawassee County; Selden S. Miner, Judge.

Action by Margaret Eiegel, administratrix of Charles Hughes, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Plaintiff's decedent was a brakeman employed by defendant. He was a member of the crew of extra freight train No. 1089, running from Durand to Detroit, acting as forward brakeman. The train left Durand about 10 p. m., and proceeded towards Detroit, doing local freight work. At 5:15 a. m. it had reached Drayton Plains, where it stopped to pick up some cars of ice. At that time regular freight train No. 66, likewise running from Durand to Detroit, was due at Drayton Plains. As soon as the extra freight stopped, Conductor Snover sent the rear brakeman, Taylor, back to protect the rear of the train. Taylor went back about three-quarters of a mile, taking with him signal flag and torpedoes. He remained there for 15 or 20 minutes for the purpose of flagging No. 66 upon its approach. At the expiration of that time, No. 66 had not arrived, and his own train signalled him by a whistle to come in. He thereupon placed two torpedoes upon the track about a rail length apart, and ran back to his train. At the time he reached it, it was already in motion. He climbed upon the rear platform, where Conductor Snover was, and held some conversation with Snover. The morning was extremely foggy, and objects could not be discerned at any considerable distance. After the train had gone about a half a mile and had acquired speed of 10 or 12 miles an hour, Snover and Taylor from their position on the back platform heard No. 66 approaching from the rear. Plaintiff's decedent, Hughes, was at that time sitting at the desk in the caboose. Snover warned him of the danger, and jumped. The engine of No. 66 crashed into the caboose before Hughes could get out, and he was instantly killed. Immediately after the accident, Taylor and Snover (who were witnesses for plaintiff) went back upon the track to the point where Taylor had fixed the torpedoes, and found them there, flattened out by the passage of No. 66, but in their opinion not exploded. Taylor testified that he had taken the torpedoes from the usual receptacle in the caboose, and that he had used other torpedoes from the same receptacle during the night at Gaines, where they had properly exploded. The negligence counted upon by the plaintiff is that the defendant furnished plaintiff's decedent with worthless torpedoes, which would not explode, and so give warning to the approaching train, and, further, that the defendant had negligently failed to properly inspect the torpedoes so furnished. Defendant proved that it purchased its torpedoes in lots of 10 to 25 gross monthly from the Railway Signal Company; that they were kept in a dry room at Battle

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Creek; that from there each month a supply was sent to Durand, where they were kept in a box on the wall, and in the dry. No complaints had ever been received by the storekeeper, at either Battle Creek or Durand, that the torpedoes failed to explode. The president of the company which manufactured the torpedoes testified that at the time of the accident his company furnished 90 per cent. of the torpedoes used by the railroads of the United States, Canada, and Mexico, and that he had never heard of one of them failing to explode; that no inspection of the torpedoes is necessary; that they can only be inspected by use, in which event they are consumed. At the close of the testimony, defendant's counsel moved for the direction of a verdict upon the grounds (1) that no negligence on the part of the defendant had been proven; (2) that the defendant, having purchased the torpedoes from a reputable manufacturer, ready for use, was under no obligation to inspect them; (3) that there was no way by which a person of ordinary knowledge could tell by inspection whether or not the torpedoes would explode. Other grounds for a directed verdict were urged by defendant, which need not be considered here. Defendant's motion was overruled, and the court upon the point in question charged the jury as follows: "It is for you to determine whether under all of the circumstances and evidence in the case whether the defendant used ordinary care and skill to discover the defects in these torpedoes, if there were any. If it did use ordinary care and skill to discover the defects, and it did not discover them, notwithstanding there were defects, plaintiff could not recover. For instance, if he used the ordinary care and skill such as an ordinary person would have done under like circumstances, and he did not discover the defects, then, gentlemen, plaintiff could not recover. Or if the defects were such, whether he investigated it or not, if they were such that a person using ordinary care and skill would not have discovered the defects in the torpedoes, then plaintiff cannot recover. Or, in other words, the defendant was obliged to use the same ordinary care and skill that any other person under like circumstances would have used, no more or no less. He is not required to use the greatest skill or the greatest care, but ordinary care—ordinary skill—and, if he used that and did not discover any defects, then plaintiff cannot recover, or, if you find there were no defects that could have been discovered by ordinary care and skill, then plaintiff cannot recover. It is only when there were defects such as could have been discovered after they came into the possession of the defendant and had remained in its possession a sufficient time, so that a person of ordinary skill and prudence by examining them would have discovered it, it is only in such a case that the defendant can be claimed to have been negligent." A judgment having resulted in favor of plaintiff, defendant brings the case here by writ of error.

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Argued before HOOKER, MOORE, McALVAY, BROOKE, and STONE, JJ.

Harrison Gcer and William K. Williams, for appellant.
Odell Chapman, for appellee.

BROOKE, J. (after stating the facts as above). The sole question for our determination in this case is whether or not the defendant owed to plaintiff's decedent the duty of inspection. The record shows that the torpedoes failed to explode. It is absolutely silent as to the cause of that failure. The president of the company which manufactured them testified: "We purchase the tin from which the torpedoes are made from the American Tin Company, which practically controls the market. We buy the best tin we can. It is possible that there might be some little defect in the tin that could not be discovered by the eye. I am only giving a possibility, the only way I could conceive of a thing happening. I have never known of a case where this did happen, but it is about the only way that I know of that could happen to bring about this result. * * * Manufactured tin is not always perfect. There are at times little flaws in it, and the coating wearing off the top may leave a small hole in the case which is almost impossible to detect. Moisture or oil may soak through and destroy the contents. * * * We Japan all our goods ourselves. I have known of millions of torpedoes, manufactured by our company, and they have always exploded properly. To my knowledge, they have never failed. I think our composition and manufacture of them is as perfect as human agency can produce. * * * We have furnished torpedoes to defendant for 10 or 15 years prior to 1905. Our long experience has brought about every possible safeguard in the manufacture of these goods. Every torpedo is made by hand, and filled by hand. They go through a process, and it is almost impossible to have any defects in a torpedo. It would be dangerous for one unfamiliar with their manufacture to inspect a torpedo by trying to separate it. The ordinary way of inspection is to put them on the road and try them out. It is not safe to strike one with a hammer, or anything of the kind. That has been done in some cases with disastrous results. They are prepared and sold by us, for immediate use, to the various railroads, and there is nothing for the railroad company to do after we have prepared them, except to take care of them and use them. A chemical change will not take place through age which will prevent them exploding. The uncontradicted testimony showed that, after coming into the possession of defendant, the torpedoes were properly stored in a dry place. We have then an article of commerce, dangerous in its character, in general use upon all of the railroads of the country, made by a reputable manufacturer, sold to the defendant ready for use, the ordinary mode in inspection of which, in the hands of the consumer, is by use and consumption.

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Under these circumstances, we are asked to say that it was proper to permit the jury to determine "whether the defendant used ordinary care and skill to discover the defects in these torpedoes, if there were any." We are unable to agree with this contention. Even assuming that the torpedoes in question were properly placed as testified to by Taylor, and that they failed to explode, there is still no evidence in the record tending to show the cause of such failure. The jury might surmise that the tin casing had become rusted, or was originally defective, and, further, that an inspection by the eye might possibly have discovered such defect. No evidence of either fact was offered, and the conclusion of the jury to that effect would be based upon conjecture only. Touching the necessity for inspection by defendant, if inspection in the ordinary acceptance of that term were possible, we find that defendant had no knowledge or notice of any defects in the torpedoes or any information, which would impose upon it a duty of inspection, never before undertaken. Its experience, covering a period of 10 or 15 years, in the use of these appliances was such as to indicate that, when properly placed, they invariably exploded. The experience of the manufacturer but adds weight to that of the defendant. The mere fact that there is a bare possibility that the casing of one torpedo out of many thousands may be constructed of defective tin, thus permitting the tin to rust through and admit water and oil, if brought in contact therewith, is not sufficient to warrant a finding that the defendant was negligent in failing to so inspect as to discover the fault. *Siegel v. United Electric Heating Co.*, 143 Mich. 484, 106 N. W. 1127; *Clement v. Rommeck*, 149 Mich. 395, 113 N. W. 286, 13 L. R. A. (N. S.) 382, 119 Am. St. Rep. 695. A valuable discussion of the principle here involved will be found in *Shea v. Wellington*, 163 Mass. 364, 40 N. E. 173.

Defendant owed to plaintiff's decedent the duty of furnishing safe appliances. This duty does not amount to an insurance to the employee that the appliances so furnished shall be absolutely perfect. Having used reasonable care in the selection of the article, and such vigilance in its inspection as is consistent with the character of the article, and with good railroading, the defendant has discharged that duty, and a jury may not be permitted to speculate in such case. *Fuller v. Ann Arbor Railroad Co.*, 141 Mich. 66, 104 N. W. 414; *Marquette, etc., R. Co. v. Kirkwood*, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; *Smith v. Hockenberry*, 138 Mich. 129, 101 N. W. 207. The mere fact that an accident has occurred resulting in the injury of an employee raises no presumption of negligence on the part of the master. *Toomey v. Steel Works*, 89 Mich. 249, 50 N. W. 850; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 3 N. W. 240; *Robinson v. Charles Wright & Co.*, 94 Mich. 283, 53 N. W. 938.

The judgment is reversed, and a new trial ordered.

PETERS v. BESSEMER & L. E. R. Co.

(Supreme Court of Pennsylvania, June 22, 1909.)

[74 Atl. Rep. 61.]

Master and Servant—Injury to Servant—Negligence of Master—Evidence.—A railroad company is not guilty of negligence in the construction of a switchyard because at certain points the cars could not clear.

Death—Damages—Maintenance of Infant—Evidence.—In an action for damages for killing of a boy under age, some proof of the probable cost of maintenance during minority is indispensable, in order that the item should be deducted from his probable earnings, to establish the real damages.

Appeal from Court of Common Pleas, Erie County.

Action by Margaret Peters against the Bessemer & Lake Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

The circumstances of the accident are stated in the opinion of the Supreme Court. The defendant submitted the following points: "(6) There is no evidence to justify the submission to the jury of the question of the negligence of the defendant as to the construction of the tracks in the yard of the defendant company. Answer: Refused." "(9) Even if the evidence showed negligence on the part of the defendant company in regard to one or more of the allegations made in the plaintiff's statement, the evidence shows that neither of said alleged acts of negligence on the part of the defendant company was the proximate cause of the accident, and that the proximate cause of the accident was the negligence of some one or more of the fellow servants of the plaintiff's son, for which the defendant company was not liable. Answer: Refused. We refer the question of proximate cause to the jury." "(11) The burden was upon the plaintiff to show what the net earnings of her son would probably be during minority. She has not shown what the cost, or probable cost, of his board, clothing, and maintenance during minority would be, and there is no evidence upon which the jury can base a calculation of his net earnings. They cannot be permitted to guess at the probable cost of his board, clothing, and maintenance, and the verdict therefore should be for the defendant. Answer: Refused. The jury cannot guess at anything. You will have to find that from the evidence. The evidence shows that the young man was earning about \$70 a month, but I say to you, as I have already explained, that his mother could not recover his full earnings, but only so much as would have gone to her benefit. You will have to find that from the evidence and

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the circumstances in the case, considering the young man's age and the circumstances as developed by the testimony. (12) Under all the evidence the verdict of the jury should be for the defendant. Answer: Refused."

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

Frank Gunnison, John S. Rilling, Henry E. Fish, E. S. Templeton, S. J. Orr, and T. C. Whiteman, for appellant.

U. P. Rossiter, for appellee.

BROWN, J. Herbert Peters, the son of the appellee, was in the employ of the appellant as a brakeman, and shortly after he was 17 years old was killed, while riding on the tender of a locomotive in a switchyard, by being struck or "side-swiped" by a car on an adjoining switch. In the yard in which he was killed a number of switches or tracks branched south from a "ladder" track on the north for a distance of upwards of 1,500 feet. A locomotive had entered from the "ladder" track upon the track or switch known as No. 24, for the purpose of taking 10 cars from it to another track in another part of the yard. When the locomotive entered upon track No. 24, the deceased was riding in the gangway between the engine and the tender. After the cars were coupled to the locomotive, it backed towards the north, and Peters, who had changed his position and was standing on the end of the tender, came into collision with a car standing on track No. 25, and was instantly killed. There was a recovery by the plaintiff, under instructions that she was entitled to recover if the jury should find that the proximate cause of her son's death was either the bad construction of the system of tracks in the switchyard or want of proper instructions to him, and he had not been guilty of contributory negligence.

The only testimony upon the question of the defendant's negligence in the construction of its switches was that of Jesse Supplee, a civil engineer, but, when properly scanned, it fails to show faulty construction. The only difference between the construction of the appellant's switchyard and others that the witness had seen was in the distance from the frog to the point of clearance. Here the distance was 100 or 110 feet; in some others that the witness had seen it was about 60 feet. He admitted that switches are frequently constructed with the point of clearance as distant as in the defendant's yard, when it is desirable or necessary to save ground. It did not require the testimony of this witness to show that either system is safe after the clearance point is reached. Any system is dangerous from the frog to that point, and none can be said to be faulty in construction merely because of the distance of the point of clearance. The witness further stated that switches are deceptive as to the point of clearance, but that after dark there is no difference between them in this

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respect. Peters was killed after it was fully dark, and the yard was not lighted up. The sixth point submitted by the defendant should have been affirmed. As authority for the court's refusal to affirm it, appellee's counsel seem to rely upon *Vorhees v. Lake Shore & Michigan Southern Ry. Co.*, 193 Pa. 115, 44 Atl. 335, but that case is clearly distinguishable from the present one so far as any faulty construction of tracks is concerned. In switchyards there must be points where cars will not clear. Vorhees was not injured in such yard. He was hurt while riding on one of two parallel sidings, between which, at the point where he came in contact with the car on the adjoining siding, the distance between the tracks ought to have been, according to the regulations, from 7 feet to 7 feet 2 inches, but were so constructed as to leave only from 5 feet to 5 feet 6 inches between them. He had never been on that siding before, and had no knowledge that the space between it and the next one was so narrow.

Though the defendant's eleventh point could not have been affirmed as a whole, complaint is justly made that the jury were permitted to guess at the probable cost of boarding and clothing the deceased during his minority. The instructions were that they would have to find this item from the evidence, and could not guess at it, but there was not a particle of evidence as to what the probable cost of the son's maintenance would be. The jury, therefore, simply did guess. This must not be permitted on the new trial, for some proof of the probable cost of maintenance during the minority is indispensable in an action like this for damages by the parent.

On question of the failure of the appellant to properly instruct the deceased as to the danger incident to moving cars in the switchyard the case was for the jury, for the evidence failed to show that he was familiar with the construction at the north end of the switches, where he was killed, or that he knew at what point there would be a clearance between the tracks. But for the two errors pointed out, this judgment would be affirmed. In all other respects the case was submitted to the jury under correct instructions.

Judgment reversed, and venire facias de novo awarded.

ST. LOUIS, I. M. & S. R. CO. *v.* WHITE.

(Supreme Court of Arkansas, Jan. 17, 1910.)

[125 S. W. Rep. 120.]

Master and Servant—Injury to Servant—Noncompliance with Statutes.*—A railroad company is liable for the killing of its brakeman by the derailment of its engine from striking a cow on the track, the servant not assuming the risk from the master's failure to comply with statutory requirements for his protection, the locomotive not being equipped with a headlight of 1,500 candle power, as required by Act May 28, 1907 (Acts 1907, p. 1019) § 1, but with a coal oil headlight; the statutory requirement that railroads keep a constant lookout for objects on the track being also for the benefit of employees as well as others, and the evidence warranting the jury in finding that, had the engine been equipped as required by the statute, the engineer, who did not see the cow, could, if keeping a lookout, have seen her in time to have stopped the train, or to have checked it so as to avoid the derailment and resulting injury.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Laura C. White against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lovick P. Miles, for appellant.

Sam R. Chew, for appellee.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railway Company from a judgment rendered against it in the Crawford circuit court in favor of Laura C. White.

John W. White was in the service of the defendant as brakeman, and was killed by the derailment of one of its trains at Menifee, Ark. The occurrence took place in the nighttime, and the train was running at the rate of 20 or 25 miles per hour. White was on the engine, which was drawing about 23 loaded cars. When the train approached the switch at Menifee, the engine struck a cow. The pony trucks of the engine became derailed, and followed the main track until the train reached the switch, when the pony trucks followed the lead rails to the side

*For the authorities in this series on the question whether a railroad employee assumes the risks arising from the violation of an ordinance or statute prescribing precautions to be observed by his company, see foot-note of *Chicago & E. R. Co. v. Lawrence (Ind.)*, 27 R. R. R. 652, 50 Am. & Eng. R. Cas., N. S., 652, where all those preceding it are collected; third foot-note of *Cleveland, etc., Ry. Co. v. Powers (Ind.)*, 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563.

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track and caused the engine to become derailed. It turned over and crushed the brakeman White to death. Appellee, the mother of the deceased sued appellant for damages on account of his death. John White died intestate. He was unmarried, and lived with his mother. The allegation of negligence upon which she recovered was the failure of the appellant to have the engine equipped with a headlight of 1,500 candle power, in compliance with the act of the Arkansas Legislature, approved May 28, 1907.

Section 1 of the act provides that railroads over 50 miles in length, operated in whole or in part in this state, shall be required to equip, maintain, and use, upon each and every locomotive being operated in road service in the state, a headlight of power and brilliancy of 1,500 candle power. Section 2 provides a penalty for the failure to comply with the terms of the act. Acts 1907, p. 1019. In the case of *Johnson v. Mammoth Vein Coal Company*, 88 Ark. 243, 114 S. W. 722, 123 S. W. 1180, 19 L. R. A. (N. S.) 646, the court held that the servant does not assume the risk of injury caused by the master's failure to comply with a statutory requirement for his protection. The statutory requirement that railroads shall keep a constant lookout for persons and property upon their tracks is also for the benefit of employees as well as others. *St. Louis Southwestern Ry. Co. v. Graham*, 83 Ark. 61, 102 S. W. 700, 119 Am. St. Rep. 112, and cases cited. "In an action against a railroad company by an employee to recover for damages received in an accident, negligence of the railroad company will not be presumed merely from the occurrence of the accident, but must be proved, and the burden is on the plaintiff to establish it." *St. Louis & San Francisco R. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738; *L. R. & Ft. Smith Ry. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245. Tested by these rules of law, was the defendant liable under the facts disclosed by the record? The engineer testified that he did not see the cow before she was struck. His engine was equipped with a coal oil headlight. With it he could see "three or four or five hundred feet" ahead of him, and as much as 8 or 10 feet on either side. His train was from 500 to 700 feet long. The right of way where the injury occurred was clear and unobstructed, and the track was practically level.

The appellee adduced evidence tending to show that an electric headlight of 1,500 candle power would enable the engineer to see ahead for a distance of 1,700 to 2,000 feet, and would throw light from one side of the right of way to the other; that the train running on a practically level track at the rate of from 20 to 25 miles per hour could have been brought to a stop at 1,100, and could be reduced 5 or 10 miles an hour in 600 feet; that cattle lay down on the track at night, as well as in the daytime. Although the evidence is not very satisfactory, we think the

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jury were warranted in finding that, had the engine been equipped with a headlight of the candle power required by the statute, the engineer, if he had been keeping a lookout, could have seen the cow in time to have stopped the train, or at least could have checked the speed to such an extent before striking the cow that the derailment of the engine and the resulting injury could have been avoided, and that the company was guilty of negligence in using the oil headlight.

The judgment is therefore affirmed.

WICKHAM v. DETROIT UNITED RY.

(Supreme Court of Michigan, March 5, 1910.)

[125 N. W. Rep. 22.]

Master and Servant—Negligence of Fellow Servants—Nature of Act—Transitory Negligence—Use of Appliances.*—Plaintiff, a street car conductor, was injured while on the running board by his foot coming in contact with a loaded wheelbarrow negligently left too near the track by one of the company's sectionmen for such a short time that it did not have actual or constructive notice of the obstruction. Held, that a master is not liable for injuries caused by a transitory act of a co-servant in using a safe appliance negligently, so that the company was not liable for plaintiff's injuries; the car and roadbed being a safe place of work in absence of the servant's negligence.

Error to Circuit Court, Wayne County; Alfred J. Murphy, Judge.

Action by Fred L. Wickham against the Detroit United Railway. Judgment for defendant, and plaintiff brings error. Affirmed.

Argued before OSTRANDER, McALVAY, BROOKE, BLAIR, and STONE, JJ.

Proctor K. Owens and Lehman, Riggs & Lehman, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

STONE, J. This is an action on the case for damages for a personal injury to the plaintiff. On June 30, 1906, the plaintiff was a street car conductor in the employ of the defendant. He was 35 years old, and had acted as conductor over 5 years. On the day in question he went on duty at the Dix avenue car barn

*See fourth foot-note of Indianapolis, etc., Co. v. Kinney (Ind.), 31 R. R. R. 264, 54 Am. & Eng. R. Cas., N. S., 264.

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about noon. He was conductor on what was known as the "Baker line," which extends from said car barns to the railroad track on North Chene street. At the time of the injury, the plaintiff's car was running in an easterly direction along Dix avenue between Scotten and Hubbard avenues. It was an open car, with seats extending entirely across it, and, in the discharge of his duties, he was required to be on a running board extending along the right-hand side of the car. He was on the south side of the car. Immediately before he was injured, the plaintiff was collecting fares, which required him to look north, or into the car. While thus engaged his legs came in contact with a loaded wheelbarrow, a part of which extended over the running board of the car, and his feet were knocked from under him. He fell upon the pavement, and sustained the fracture of two ribs and other injuries. On the day and at the place in question, the sectionmen of the defendant were engaged in repairing the tracks, and the facts showed that while these repairs were in progress a wheelbarrow loaded with brick was left at such a point upon the pavement that, when the car in question came along, a collision between the wheelbarrow and the car occurred. The only reasonable inference is that the wheelbarrow was left temporarily in the position in which it was by one of the sectionmen of the defendant. Upon the close of plaintiff's case the trial judge directed a verdict for the defendant, on which ruling error is assigned by the plaintiff, and the case is here upon writ of error.

As we understand the plaintiff's position, no claim is made that the wheelbarrow which caused the injury had been left in the position in which it was at the time the injury occurred for a sufficiently long time to give the defendant constructive notice of its presence, and no claim is made that any of the servants of the defendant were incompetent, and no defect in the roadbed, nor instrumentalities furnished the defendant's servants, appearing, we come to the question of defendant's liability.

The learned circuit judge in his charge directing a verdict for the defendant said: "It is perhaps a reasonable inference to say from the proofs—reasonable at least for the purpose of this motion—that the wheelbarrow was left in the position in which it was at the time of the collision by one of the defendant's employees. Now, gentlemen of the jury, was the act of that employee in placing that wheelbarrow where it would come in collision with a passing car the act of the defendant company? It had provided a safe place for the plaintiff here to work when it gave him a proper car, and when it provided for the operation of that car a proper roadbed. Was that safe place so provided made unsafe by the workmen in leaving that wheelbarrow where it would overlap an approaching car? That is to be answered, probably, in the affirmative. The act of the workman in that respect in leaving that wheelbarrow in that precise position was an

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act of negligence on his part. But was it such an act of negligence as makes the defendant company responsible for the workman's misconduct? In my view that question must be answered negatively. Why? Bearing in mind that the roadbed was a safe place, any change in its condition which made it unsafe grew out of the temporary act of the workman leaving that wheelbarrow in that particular position. The danger arose, not from any permanent condition of that track, but grew out solely and alone of a transitory act of a workman while engaged in repairing the track. * * * There is nothing in this record from which it could be inferred that that wheelbarrow had been there for any length of time; for all that this proof shows that wheelbarrow may not have been there a minute at the time that car approached. Consequently there can be no claim that the defendant company knew that the wheelbarrow was there. Nor can there be any claim that the wheelbarrow, in point of fact, had been there sufficiently long so that the company should have ascertained its presence. These features are not in the case." To support his position, the plaintiff has cited a large number of cases in this court upon the question of the nondelegable duty of the employer to provide a safe place to work, among which is the case of *Balhoff v. Michigan Central R. Co.*, 106 Mich. 612, 65 N. W. 592. An examination of that case will show that the plaintiff was injured by reason of a permanent defective condition of the track, allowing the formation of ice on the track and rails, and the question of the defendant's negligence in not foreseeing the probability of such a condition from the attending circumstances was left to the jury. Justice Grant in a concurring opinion in that case said: "This is not the case of an obstruction suddenly placed upon the track, or of a sudden defect in the roadbed, without the fault of the defendant, and for which it is not liable unless it had actual or constructive notice." We think that the numerous cases cited by the plaintiff can all be distinguished from the case at bar. We have not the space here to notice all of them. *Sadowski v. Car Co.*, 84 Mich. 100, 47 N. W. 598, involved the failure of the defendant to furnish a safe place to work, and the negligence consisted in leaving a ditch which had been dug during the night before unguarded, the digging of which had been performed under the direction of a vice principal of the defendant. *Gillespie v. Grand Trunk Ry. Co.*, 150 Mich. 303, 113 N. W. 1116, involved the failure of the defendant company to remove gravel from between and outside its rails, the same having been allowed to remain there for a period of from two to four days. The question of notice was also in the case. *McClarney v. Chicago, M. & St. P. Ry. Co.*, 80 Wis. 277, 49 N. W. 963. We do not think that this case is in point as the negligence of the defendant consisted in allowing old snow and ice to

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accumulate on the tracks. The court said: "This condition of things had continued nearly all winter, and snow between the tracks was piled up to the depth of two or three feet. * * * The learned circuit court held, and, as we think properly, that, if the accident was caused by the new fallen snow of the previous night, no negligence could be imputed to the company for not having removed it, because it had not had sufficient time to do so before the accident."

We think that there can be no question as to the law in this state in a case like the one presented in this record. The authorities cited by the plaintiff relate to the rule that the master in the performance of the nondelegable duty of providing a safe place for his employees to work cannot invoke the defense of fellow servant to evade liability. This is a sound doctrine when applied to situations where the master has failed to provide a reasonably safe place to work, or has failed to supply reasonably safe appliances. It does not follow, however, that the employer can be held responsible for the transitory negligent act of a co-employee of the plaintiff, which negligence occurs in the use of a proper tool or instrumentality in a negligent manner, where the defendant in the nature of the case could have no knowledge of the condition, or the act of the fellow servant. Had the plaintiff been injured by a defective condition of the roadbed upon which the car was traveling at the time of the injury, or had the defendant company provided unsafe instrumentalities for the use of the sectionmen in the work of repairing the track, there would be force in the plaintiff's claim. We have held that where a master provides a reasonably safe place for his servant to work, and has provided reasonably safe appliances with which to work, and provides reasonable inspection to see that the instrumentalities and premises are kept in a reasonably safe condition, he has fulfilled his obligation to his servant. The master, however, is not an insurer for the negligent transitory act of a workman who uses an admittedly safe appliance in a negligent manner. *Miller v. Mich. Cent. R. Co.*, 123 Mich. 374, 82 N. W. 58. In the case cited the foreman of a section gang was injured by the improper loading of a freight car by its crew. There was also the negligence of the station agent in failing to properly inspect the loaded car. A timber projected from one of the cars and struck the section foreman, who was working with his men surfacing the track of the defendant company. Justice Moore, in an opinion reversing a judgment for the plaintiff, said: "The trial judge was in doubt as to whether he ought to have charged the jury that the conductor and the station agent, who were responsible for the loading of the timber, were fellow servants with the plaintiff or not. He expressed himself as of the opinion that the cases decided in this court were not harmonious, and that under the later cases he ought to allow the case to go to

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the jury. He doubtless referred to the cases of Balhoff v. Railroad Co., 106 Mich. 606, 65 N. W. 592; Anderson v. Railroad Co., 107 Mich. 591, 65 N. W. 585; McDonald v. Railroad Co., 108 Mich. 7, 65 N. W. 597. A reference to these cases will show that each of them announced the doctrine that it was the duty of the master to provide a reasonably safe place to work, and machinery, tools or appliances in a reasonably safe condition with which to work, and that this was a duty which could not be delegated by the master, so as to escape liability. If the master has provided a safe place to work, or tools, machinery, and appliances reasonably safe with which to work, these cases do not indicate that the negligent use of these things by a fellow employee would make the master liable. These cases, as applied to the testimony in the case at bar, restricted as it was by the court to the third count in the declaration, did not justify a submission of the case to the jury upon the theory that the station agent and conductor were not fellow servants. In that respect the case is controlled by Dewey v. Railway Co., 97 Mich. 329, 52 N. W. 942, 56 N. W. 756, 16 L. R. A. 342, 22 L. R. A. 292, 37 Am. St. Rep. 348; Jarman v. Railway Co., 98 Mich. 135, 57 N. W. 32; Loranger v. Railway Co., 104 Mich. 80, 62 N. W. 137; and Frazee v. Stott, 120 Mich. 624, 79 N. W. 896. The last-named cases all relate to the negligent use by fellow servants of cars, machinery, or appliances which were reasonably safe for the purposes for which they were intended. Under such circumstances, it is held that the negligence of the fellow servant does not make the master liable. If the distinction we have pointed out is borne in mind, we think it will be found the decisions are not inharmonious." In Loranger v. Railway Co., *supra*, it was held that a brakeman and sectionman are fellow servants, and Justice Grant, speaking for the court, in passing upon the question of the duty of the master to provide a safe place, employed the following language: "The defendant had furnished a good roadbed, and in this respect had done its duty in furnishing a safe place. It was rendered unsafe temporarily by the act of a fellow servant. In order to bind defendant, actual notice of the construction must be shown, or it must be shown to have existed for such a length of time that the law will imply notice. Neither is shown or claimed. This is another attempt to avoid nonliability for the acts of a fellow servant by invoking the doctrine of a safe place. Jarman v. Railway Co., *supra*, and authorities there cited; Railway Co. v. Adams, 105 Ind. 163 [5 N. E. 187]." A strong case in point is that of Haskell & Barker Car Co. v. Prezeddzianowski, 170 Ind. 1, 83 N. E. 626, 14 L. R. A. (N. S.) 972, 127 Am. St. Rep. 352. In the case at bar the trial court clearly pointed out why the defendant is not liable to the plaintiff, and distinguished the situation here,

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where the negligent act is a transitory, momentary one, occurring from the very work of making the premises safe, by improper use of a safe appliance, from the position taken by the plaintiff.

We find no error in the record, and the judgment below is affirmed.

LOUISVILLE & N. R. CO. v. PEARCY.
(Court of Appeals of Kentucky, Oct. 22, 1909.)
[121 S. W. Rep. 1037.]

Master and Servant—Injury to Servant—Evidence of Circumstances.—A railroad company, has a right, when backing an engine to make a coupling, to do so with a car attached to the engine, so that the reason it was attached (a defect therein) is immaterial, and may not be shown by the brakeman, who was to have made the coupling, and who was injured through alleged neglect of the engineer to obey a stop signal.

Master and Servant—Injury to Servant—Evidence of Circumstances.—A railroad company having the right to pile timber along its track, a brakeman, injured, while preparing to make a coupling, through a stop signal given the engineer being neglected, may show such piling, and consequent obstruction of the view between him and the engineer, only as the reason for his communicating the stop signal to the engineer through the fireman, instead of directly to him.

Evidence—Best and Secondary Evidence.—The rules of a company being in writing, the written rules are the best evidence.

Master and Servant—Injury to Servant—Evidence.—A brakeman, injured in making a coupling, may not show that another brakeman was intoxicated; nothing he did or omitted to do having anything to do with the accident.

Master and Servant—Injury to Servant—Contributory Negligence.—Whether a brakeman was negligent in going on the track, and working on the lever of a car to which a coupling was to be made, without waiting to see whether a stop signal he gave the engineer was obeyed, was a question for the jury, where the engineer had been running by his signals, and had previously obeyed all given by him, and the train was moving very slowly.

Trial—Peremptory Instruction.—A peremptory instruction, on the ground that an engineer did not receive the stop signal of a brakeman, cannot be given; the fireman having testified he received it, and communicated it to the engineer.

Master and Servant—"Fellow Servants."*—The fireman and a brakeman of a train are "fellow servants."

*For the authorities in this series on the question whether the members of the same train crew are fellow servants, see second foot-note of *Louisville & N. R. Co. v. Vincent* (Tenn.), 22 R. R. R. 415, 45 Am. & Eng. R. Cas., N. S., 415.

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Master and Servant—Injury to Servant—Liability of Master—Gross Negligence.—A railroad company is not liable for injury to a brakeman; where death did not ensue, unless the negligence of its engineer causing it was gross.

Trial—Instructions—Conformity to Facts.—There having been no evidence of negligence of a superior servant other than that of an engineer, in an action for injury to a brakeman, an instruction, instead of being as to finding negligence of "agents" of the company and "servants" superior to the brakeman; should have been as to finding negligence of the "engineer."

Damages—Personal Injuries—Measure of Damages—Instructions.—The measure of compensatory damages for personal injuries is erroneously stated by an instruction that the jury could take into consideration the age and situation of the person, his earning capacity, and its probable duration, his bodily suffering and mental anguish resulting from the injuries, the loss from want of the injured limbs, and the extent to which he is disabled by the injuries from making a support for himself.

Master and Servant—Injury to Servant—Contributory Negligence—Instructions.—In place of an instruction, in an action by a servant for injuries, that though he was injured through the negligence of defendant's superior servant, yet if he by his own negligence contributed to the injury, and but for his negligence would not have been injured, he could not have recovered, there should have been given one that he was bound to exercise such care to keep out of danger as may be reasonably expected of a person of ordinary prudence situated as he was, and if he failed to do so, and but for such failure he would not have been injured, he could not recover, notwithstanding any negligence of the superior servant.

Master and Servant—Injury to Servant—Actionable Negligence—Instructions.—The jury, in an action for injury to a brakeman through failure to stop the engine, as signaled by the brakeman, should be instructed that, though he gave a stop signal to the fireman, if the latter did not pass it to the engineer, as to which the evidence was conflicting, the company was not liable.

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by John Percy against the Louisville & Nashville Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Benjamin D. Warfield, Jas. D. Black, and J. W. Alcorn, for appellant.

Edward W. Hines, B. B. Golden, C. C. McChord, and J. V. Norman, for appellee.

HOBSON, J. John Percy was the middle brakeman on a local

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freight train of the Louisville & Nashville Railroad Company between Middlesboro and Corbin, Ky. There was also on the train a head brakeman, a rear brakeman, and a negro who was learning the road. At Ferndale station they took on a car, the coupling apparatus of which at one end was defective, the defect being that the bumper dropped down below its proper position, and in order to couple this car, one brakeman had to hold up the bumper while the other coupled it. After this car was put in the train it went on its way, stopping at the different stations as usual until they reached Gray's station, some 35 miles further on. They had an order to meet another train there, and the conductor ordered the negro, after they stopped, to go ahead and flag down the other train, but the negro did not go as far ahead as the engineer thought necessary, and he refused to pull out on the main track, as the conductor had directed, for the purpose of going in on a side track, and getting out a car that stood on it. The conductor had ordered the head brakeman and Percy to attend to this while he went back to the rear of the train to send the rear brakeman to the rear to flag any train that might be approaching in the rear. When the engineer refused to pull out on the main track, saying that the negro had not gone far enough, the conductor ordered the head brakeman to go forward and signal the coming train. He thereupon went forward, gave the necessary signals, and told the negro to go back and help Percy. The engineer pulled out on the main track, and Percy threw the switch and signaled the engineer back. He then went back to the switch leading to where the car was they wanted to get, and threw that switch and signaled the engineer on back. The engineer came on back slowly, and Percy went down to where the car was. When he got there, he found the lever of the car would have to be adjusted before the coupling could be made. He thereupon gave a stop signal, and, assuming that it would be obeyed, went to work on the lever, having his back to the approaching train. It was dark, and he suddenly discovered that the train had not stopped, and was coming upon him. He attempted to jump out, but in doing so his foot was caught, and one arm and one leg were run over. The engineer was on the right side of the engine. Percy was on the left side, and was passing the signals to the engineer through the fireman. He brought this suit against the railroad company to recover for his injuries, and having recovered \$12,500, the railroad company appeals.

The above are the facts as stated by the plaintiff, and as the proof for him conduced to show. The engineer testified that he got no stop signal from the fireman, or any one else, and that he was backing as he had been signaled to do when the injury occurred. It was dark, and nothing could be seen except the light of the lanterns by which the signals were given. The engineer

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also testified that there was a man on each side with a lantern in his hand, while Percy says that there was no one there by him. The negro who had been ordered back by the rear brakeman to help Percy was not introduced on the trial, and the proof does not show where he was.

Much evidence was introduced on the trial as to the car picked up at Ferndale, and as to the coupling being defective, it being claimed by the plaintiff that one reason he could not see the engineer was that this car had been left attached to the engine by the direction of the conductor, on account of the difficulty in coupling and uncoupling it. All of this evidence should have been excluded from the jury. A railroad company has a perfect right to make couplings with more or less cars attached to the engine, and the reason why a particular car is attached to the engine is wholly immaterial. Percy knew all about the car, and understood the situation perfectly. All the testimony relating to this car, including the testimony as to what the conductor had said, should have been excluded from the jury. There was also evidence to the effect that there was a pile of timber which obstructed the view between Percy and the engineer, and this was also given as a reason why he was signaling from the fireman's side, as the track was on a curve, and the timber came in between him and the engineer. The railroad company has a right to pile timber along its tracks, and the fact that this timber obstructed the view was immaterial, except as showing why the signals were given on that occasion as they were. The court on another trial will so tell the jury. There was much evidence about the rules of the company. Where the rules are in writing, the writing should be introduced, for the written or printed rule is the best evidence. The rear brakeman had nothing to do with the coupling of the cars, as he had been sent back to flag the train in rear, and no evidence should have been admitted as to his being intoxicated, because nothing that he did or omitted to do had anything to do with the accident. The court at the conclusion of the trial excluded the evidence as to the car picked up at Ferndale, as to Biscoe's being intoxicated, and as to the timber piled on the right of way, but on another trial it will not be admitted, except as above stated.

Whether Percy should have gone in to work at the lever after he gave the stop signal, and before he knew that it was obeyed, is a question for the jury. The engineer had been running by his signals; he had obeyed all the signals which he had given; the train was running very slowly; and what a man of ordinary prudence would do under the circumstances would depend somewhat upon the custom of doing the business. Time is of great importance in the railroad business. Brakemen must necessarily discharge their duties as promptly as they can, and we conclude that it should be left to the jury to determine whether Percy

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used ordinary care in going in as he did. The fireman in effect testified he received a stop signal from Percy, and passed it to the engineer. In view of this evidence we cannot say that a peremptory instruction should have been given on the ground that the engineer did not receive the signal which Percy gave. The case is here on all the evidence.

The court gave the jury these instructions: "(1) If you shall believe from the evidence that the plaintiff, John Percy, on the occasion mentioned in the evidence in this case, was run over and injured by defendant's train or engine, whereby he lost a leg and an arm, as exhibited to the jury, and you shall further believe from the evidence that said injuries were caused by the gross carelessness or the gross negligence of the defendant's agents and servants superior to plaintiff then and there controlling, managing, and operating the said train or engine, you shall find for the plaintiff, but unless you shall believe from the evidence that the said injuries to the plaintiff were caused by the gross carelessness or gross negligence of the defendant's aforesaid agents or servants, in the control, management, or operation of said train or engine, you should find for the defendant. If you find for the plaintiff, you should find for him such damages as you may believe from the evidence he has sustained, and in estimating the amount of such damages, you should take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering, and mental anguish, resulting from the injuries received and the loss sustained by the want of the limbs injured, and the extent to which he is disabled from making a support for himself by reason of the injuries received, and you may, in addition to such compensatory damages, find punitive damages in your discretion, not exceeding, however, for all injuries complained of, \$25,000, the amount claimed in the plaintiff's petition. (2) Although you may believe from the evidence that the plaintiff was injured through the gross carelessness or gross negligence of the defendant's aforesaid agents or servants, yet if you shall further believe from the evidence that the plaintiff, by his own carelessness or negligence at the time of his injury, contributed to the same, and that but for his said carelessness or negligence he would not have been injured, you should find for the defendant. (3) Gross negligence, in the meaning of these instructions, is the absence of slight care. (4) The defendant is not the insurer of the safety of its employees, and the plaintiff in accepting the employment as brakeman assumed all the ordinary risks incident to said business."

There was nothing in the evidence to show any negligence on the part of the conductor. The fireman and the brakeman were fellow servants. *Southern R. R. Co. v. Clifford*, 110 Ky. 731, 62 S. W. 514, 23 Ky. Law Rep. 111. As death did not result,

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the defendant was not liable, unless there was gross negligence on the part of the engineer. In lieu of the first clause of instruction No. 1 the court should have told the jury that, if they believed from the evidence that the engineer operating the engine in question received a stop signal, and by gross negligence failed to obey it, and thereby caused the plaintiff to receive the injuries sued for, they should find for the plaintiff. In lieu of the second clause of the instruction he should have told the jury that, unless they believed from the evidence that the engineer received a stop signal, and by gross negligence failed to obey it, they should find for the defendant. The measure of compensatory damages given in instruction 1 is erroneous. *L. & N. R. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280, 24 Ky. Law Rep. 2487; *L. & N. R. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905, 24 Ky. Law Rep. 1566; *Lexington R. R. Co. v. Herring*, 96 S. W. 558, 29 Ky. Law Rep. 798. On another trial the court will define the measure of compensatory damages as indicated in these cases. In lieu of the second instruction the court will tell the jury that it was incumbent upon the plaintiff to exercise such care to keep out of danger as may be reasonably expected of a person of ordinary prudence situated as he was; and if he failed to do this, and but for such failure, he would not have been injured, they should find for the defendant, although there was gross negligence on the part of the engineer as set out in No. 1. By another instruction the court should tell the jury that, although the plaintiff gave a stop signal to the fireman, still if the fireman did not pass it to the engineer, the defendant is not liable.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

HALLOCK v. NEW YORK, O. & W. RY. CO.

(Court of Appeals of New York, Feb. 8, 1910.)

[90 N. E. Rep. 1124.]

Master and Servant—Injury to Servant—Contributory Negligence.*

—Where a station agent was aware that a freight train was being switched, and that the work necessarily involved the movement of cars over a side track on which already some part of the freight train had three times passed, and the track was straight for a long distance, and he loitered for two or three minutes on the track without looking to see if the movements of the train thereon had ceased upon the arrival of a passenger train, and was struck by a freight car, he was negligent, though a rule of the company provided that trainmen on trains approaching a station where another train is receiving and discharging passengers shall not pass the train on either side until it has proceeded beyond the station.

Master and Servant—Injuries to Servant—Discovered Peril.†—

Though a station agent when struck by a switching freight train was in a place of danger through his own negligence, it would not excuse the negligence of the train crew in running him down after his dangerous position was apparent.

Master and Servant—Fellow Servants—Brakeman and Station Agent.—A station agent and a freight brakeman on a train switching at the station are fellow servants.

Master and Servant—"Vice Principal"—Fellow Servants—"Direction and Control."‡—Laws 1906, c. 657, § 42a, provides that employees of a railroad company intrusted with superintendence or control of other persons in the same employ, or with the authority to control any other employee, or who have as a part of their duty physical control or direction of the movement of a signal, switch, locomotive engine, etc., shall be deemed "vice principals." Held, that the "direction and control" referred to means that which proceeds from superior authority, and the mere fact that an engineer switching freight cars

*See extensive note, 33 R. R. R. 673, 56 Am. & Eng. R. Cas., N. S., 673.

†See first foot-note of *Yeaton v. Boston & M. R. R.* (N. H.), 17 R. R. R. 160, 40 Am. & Eng. R. Cas., N. S., 160.

‡For the authorities in this series on the subject of the superior servant limitation of the fellow servant rule, see second paragraph of first foot-note of *Lyon v. Charleston & W. C. Ry.* (S. Car.), 26 R. R. R. 443, 49 Am. & Eng. R. Cas., N. S., 443.

For the authorities in this series on the question whether the superior employee of their common master was acting as a fellow servant or vice principal at the time an employee under his orders was injured through his negligence, see second foot-note of *Lapre v. Woburn St. Ry. Co.* (Mass.), 28 R. R. R. 210, 51 Am. & Eng. R. Cas., N. S., 210.

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had to rely upon a rear brakeman to give signals would not give the brakeman authority to control the engineer within the meaning of the statute so as to make him a vice principal of the railroad company, so as to render the company liable for injuries to a station agent from the negligence of the brakeman who independently of the statute would be his fellow servant.

Master and Servant—Vice Principal—Physical Control or Direction of the Movement of a Signal.—A brakeman signaling to the engineer of a freight train was not in the "physical control or direction of the movement of a signal," within Laws 1906, c. 657, § 42a, so as to render him a vice principal of the railroad company, and make the company liable for his negligence to a station agent who independent of the statute would be his fellow servant; that phrase being primarily directed to the operation of mechanical devices or machinery.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Maggie Hallock, administratrix of Gurney E. Hallock, against the New York, Ontario & Western Railway Company. From a judgment of the Appellate Division, affirming by a divided court a judgment for plaintiff (132 App. Div. 943, 117 N. Y. Supp. 1136), defendant appeals. Reversed.

Jotham P. Allds, for appellant.

Frank C. Sargent, for respondent.

CULLEN, C. J. The action is brought, servant against master, to recover damages for the death of the plaintiff's intestate. The deceased was the station agent of the defendant at a small station called "Fish Creek." In front of the station were three tracks, the nearest one a siding or switch track, the second the main track, and the third a temporary track rendered necessary for reasons unnecessary to relate. On the afternoon of August 27, 1906, a freight train arrived at the station. In it was a car to be left at the station. On the siding were standing some other freight cars. The conductor reported to the station agent, and was directed by him to place the newly arrived car behind two of the cars standing on the siding. This necessitated several movements of the train: First, to cut off the car that was to be left at the station; then to remove the cars behind which the train car was to be placed; then to return them to the siding. This work consumed some time. Fifteen or twenty minutes after the arrival of the freight train, a passenger train stopped at the station. During this period parts of the freight train had been moved in front of the station at least three times. The evidence tends to show that the deceased left the station to go to that train. On his way he met a third person and entered into conversation with him for two or three minutes, either on or so

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close to the switch track that the cars, which were being backed down that track, struck him in the back, throwing him to the side track. The injury was not regarded as severe at the time; the deceased continuing to discharge the duties of his position till the February following, when, after attending a horse race and a dance, he was taken ill and died three days later. It was claimed by the respondent that at the time the deceased was hurt he received an injury to the kidneys, which occasioned his death.

While the evidence on the subject is not very satisfactory, we cannot say that the record is devoid of evidence sufficient to support the verdict of the jury that the injury was the cause of death. Though that question is thus eliminated, the defendant contends that the record presents no evidence sufficient to justify a finding either that the plaintiff was free from contributory negligence, or that the accident was caused by negligence for which the defendant is responsible. We think the defendant is right in each of these contentions. The plaintiff relies on the following rule of the defendant company: "No. 2 A. Great care must be used by enginemen and trainmen on trains approaching a station where a train is due to stop, or is receiving and discharging passengers, to in no case pass the train on either side until such train has proceeded at least a train length beyond the station. Whenever regular passenger or other trains make extra stops to receive or discharge passengers, conductors and trainmen will exercise great care to avoid injury to passengers by trains moving on the opposite track." It is contended that the deceased had the right to rely on this rule and to assume that the movement of the cars of the freight train past the station would cease on the arrival of the passenger train. But with this rule there must be considered the further rule of the company, rule No. 192, by which the conductors of freight trains are required to report to and receive instructions from the station agents and carry out their wishes as to the placing and moving of cars at the station, and the station agents are given "charge of the yards where trains are made up, the movement of trains therein and the force employed." The deceased was aware that in compliance with his directions the switching, or cutting out of the freight cars was being carried on; that the work necessarily involved the movement of cars over the side track on which already some part of the freight train had three times passed. The track was straight for a long distance and the view thereover entirely unobstructed. With his knowledge of this situation, he loiters for at least two or three minutes on this track without looking to see if the movement of the trains thereon had ceased. The man with whom he was conversing observed the approach of the cars and escaped. The situation of the deceased was very different from that of a passenger, who would have the right to rely on the presumption that his path from the train to the station would be

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safe and unobstructed. Indeed, it seemed to be part of the duty of the deceased to have seen that the rule of the company, made for the safety and security of the passengers, was observed, instead of which he took no heed of their safety or of his own. In this respect we think he was guilty of negligence.

Though it was through his own negligence that the deceased was in a place of danger, this would not excuse the negligence of the train crew in running him down after his dangerous position was apparent. *McKeon v. Steinway Ry. Co.*, 20 App. Div. 601, 47 N. Y. Supp. 374; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75, 3 Am. Rep. 663; *Silliman v. Lewis*, 49 N. Y. 379. When the deceased was struck the cars were being backed on the siding, the cars in advance and the engine in the rear. The evidence showed that the rear brakeman saw the deceased on the side track at some distance from the point at which the accident occurred, as he says, either a car's length or two away. The brakeman testified that he called out to the deceased and the man who was with him and expected that they would move away. It is contended for the plaintiff that the warning given was insufficient, and the brakeman should have signaled the engineer to stop the train. If it be assumed that the evidence was sufficient to justify a finding of negligence on the brakeman's part, the question remains whether the defendant was responsible to this plaintiff for that negligence. The deceased and the brakeman were fellow servants, and before the enactment of chapter 657 of the Laws of 1906 (sometimes called the "Barnes act"), concededly the defendant would not have been liable for injury to one servant by the negligence of a co-servant. That statute, however, changed the rule as to liability for the misconduct of certain railroad employees. The relevant parts are the following: "Sec. 42a. In all actions against the railroad corporation, foreign or domestic, doing business in this state, or against a receiver thereof, for personal injury to, or death resulting from personal injury of any person, while in the employment of such corporation, or receiver, arising from the negligence of such corporation or receiver or of any of its or his officers or employees, every employee, or his legal representatives, shall have the same rights and remedies for an injury, or for death, suffered by him, from the act or omission of such corporation or receiver or of its or his officers or employees, as are now allowed by law, and, in addition to the liability now existing by law, it shall be held in such actions that persons engaged in the service of any railroad corporation, foreign or domestic, doing business in this state, or in the service of a receiver thereof, who are entrusted by such corporation or receiver, with the authority of superintendence, control or command of other persons in the employment of such corporation or receiver, or with the authority to direct or control any other employee in the performance of the duty of

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such employee, or who have, as a part of their duty, for the time being, physical control or direction of the movement of a signal, switch, locomotive engine, car, train or telegraph office, are vice principals of such corporation or receiver, and are not fellow-servants of such injured or deceased employee."

The rear brakeman was not a vice principal within the provisions of this statute. His duty to signal or convey information to the engineer of when the train had approached the point at which it should be stopped, a thing which the engineer himself could not observe because of the position of the engine at the rear of the train, did not, in any proper sense of the term, give him authority to control or direct the engineer in the movement of the train. The direction and control referred to in the statute means that which is conferred by or proceeds from superior authority, not from the mere fact that the engineer had to rely on an inferior employee, to discern something which he could not see for himself. This is the necessary effect of our decision in *Brown v. N. Y. C. & H. R. R. Co.*, 126 App. Div. 240, 110 N. Y. Supp. 514, affirmed 196 N. Y. 542, 89 N. E. 1096. In that case the deceased, a brakeman, was engaged in coupling cars. The rule was that, when any one was engaged in that work, signal or word directing the movement of the cars was to be given only by him. The deceased was killed by a car being moved while he was thus engaged, by a mistake in the direction given by a conductor who was standing alongside of the train. It was urged for the appellant that under the rule it was the deceased himself, not the conductor, who was the person having control and direction of the train, and that therefore the defendant was not liable. We held to the contrary and that the fact that the conductor received notice of warning from the deceased did not deprive him of his authority and control over the movements of the train. Nor can it be held that the brakeman was in the "physical control or direction of the movement of a signal." The association in the statute of the word "signal" with the terms "switch," "locomotive engine," "car," "train," seems primarily directed to the operation of mechanical devices or machinery. In the case of *Schradin v. N. Y. C. & H. R. R. Co.*, 124 App. Div. 705, 109 N. Y. Supp. 428, affirmed without opinion 194 N. Y. 534, 87 N. E. 1126, the negligence charged was that of the engineer running the train with which the deceased was killed and also that of a watchman specially detailed to warn, by a megaphone, the deceased and his fellow workmen, who were employed in erecting electric appliances along the track, of danger from approaching trains. No point was raised by the defendant that the watchman was not in charge of a signal. It may very well be, however, that, had it been raised, it would have been overruled, and we would have held an employee, whose special or sole function it was to give warning and notice to persons working, was in charge

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of a signal within the spirit of the statute, even though a mechanical device was not used. But the statute cannot be extended so as to include cases where the notice or information or warning conveyed by an employee to another employee is a mere incident of the employee's duty. In the movement of the cars in the making up of trains and the distribution of cars when the train has arrived at its destination, numberless notices, warnings, or signals, if they are to be called such, must be given by one trainman to the others and often finally to the conductor. Errors or negligence in these respects, unfortunately, are most common causes of injuries to employees in the movement of railroads. If the Legislature had intended to make a railroad company liable in all such cases for injuries to its employees occasioned by the negligence of co-employees, the intent would have been very readily expressed by simple and clear language, while the present statute seems, on the contrary, to plainly confine liability for such injuries solely to negligence on the part of certain specified employees. We are of opinion, therefore, that the defendant was not liable for the negligence of the rear brakeman, if such negligence there was.

The judgment should be reversed, and new trial granted; costs to abide event.

GRAY, EDWARD T. BARTLETT, VANN, HAIGHT, WERNER, and HISCOCK, JJ., concur.

Judgment reversed, etc.

STEVEY v. ANN ARBOR R. CO. et al.

(Supreme Court of Michigan, March 5, 1910.)

[125 N. W. Rep. 47.]

Master and Servant—Fellow Servants—Who Are.*—A towerman, in charge of the semaphore and interlocker at the crossing of two railroads, employed by the two railroads, each paying half of his compensation, is a fellow servant of an engineer of one of the railroads.

Master and Servant—Fellow Servants—Who Are.—Where two railroads operating roads crossing each other employed jointly a station agent to perform the usual duties of station agent with no general powers to prescribe rules for the performance of the duties of the towerman in charge of the semaphore and interlocker at the crossing, and the railroads prescribed rules for the guidance of the towerman and each paid half of his compensation, the mere fact that the station agent

*For the authorities in this series on the question whether employees of different masters may be fellow servants of each other, see last foot-note of *Hamble v. Atchison*, etc., Ry. Co. (C. C. A.), 31 R. R. R. 797, 54 Am. & Eng. R. Cas., N. S., 797, where all those preceding it are collected.

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employed the towerman did not prevent the towermen from being a servant of the railroads and a fellow servant of an engineer of one of the railroads.

Error to Circuit Court, Washtenaw County; Edward D. Kinne, Judge.

Action by Emma C. Stever, administratrix, against the Ann Arbor Railroad Company and another. There was a judgment for plaintiff, and defendants bring error. Reversed, and new trial ordered.

Argued before MONTGOMERY, C. J., and OSTRANDER, McALVAY, BLAIR, and STONE, JJ.

Benjamin S. Warren and Codd & Drake, for appellant Ann Arbor R. Co.

Smith, Baldwin & Alexander, for appellant Wabash R. Co.

Arthur Brown and A. J. Sawyer, for appellee.

BLAIR, J. Plaintiff brought this action to recover damages for the death of her husband, a locomotive engineer in the employ of the Ann Arbor road, alleged to have been caused by the negligence of the towerman in operating the interlocking apparatus and signal system at the crossing of the two roads at Milan in this state. Mr. Palmer, the towerman at the time in charge of the semaphore and interlocker, was employed by Mr. Debenham, the station agent for both roads, to whom the two companies had committed the hiring and discharge of the joint employees at Milan; each company paying half of his compensation. The following are stated in plaintiff's brief to be "the rules formulated by the companies governing the operation of the towerman," viz.:

"All trains will be governed by the signal to the right of their own track as they approach the crossing.

"When the distant signal shows the blade in a horizontal position, or a green light, caution is indicated, and an approaching train must be under full control and prepared to stop before passing the home signal.

"When distant signal shows the blade in a vertical position by day, or a white light by night, the train may proceed, under control, to the home signal.

"When the home signal shows the blade in a horizontal position, or a red light, an approaching train must stop before passing the signal.

"When the home signal shows the blade in a vertical position, or a white light, the train may proceed.

"At night each red and white light must be seen in its proper position or the train must stop.

"While a train, or any part of a train, is between the home

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signals, all traffic will be stopped on the crossing road by the operation of the interlocking apparatus. Trains having work to do, or required to occupy the track within these limits, must, upon the approach of a train of a superior class on the crossing road, move beyond the home signals. Trains of the same class shall not be delayed necessarily. By superior class of trains I mean a passenger train is superior to a freight, and one part of a train is superior to another if they are rated so, first, second and third class.

"When all required signals indicate proceed, trains may pass over the crossing without coming to a full stop.

"Enginemen must be governed by signals. When in a horizontal position, come to a full stop."

We also quote from plaintiff's brief as to the power of the towerman:

"Mr. Mills testifies: Q. Are you compelled on finding, of course the order board turned either way, are you compelled to obey that signal, the signal from that target, I mean? A. If it is wrong you are supposed to stop. It is your duty to obey the target; if it gives us the right we can go through; if it is turned against us we must stop. The same kind of target operates the same way for both roads. There are two of these targets, one south, one north of the depot on the Ann Arbor road, one east, and one west on the Wabash road, and each road is compelled to obey these orders. The man in the tower who operates that controls the operation of the road, of the cars. I have not the slightest doubt in the world that I saw that target turned.

"Claude Edwards testifies: I have tended the target at Milan. I quit in the forenoon of the day Mr. Stever met with his accident; had worked there tending the target for three months, worked for C. M. Debenham, agent at Milan. I worked for both companies, the Ann Arbor and Wabash, and they both paid me half, \$20 each month. I am well acquainted with Mr. Palmer. He took my place. Debenham hired Palmer. He is the agent of both roads. He hired me. He hired Mr. Palmer. He hires all the men there.

"Ansyl F. Palmer testifies: Q. Do you know what the red signal is? A. It is the danger signal. Q. What does it mean? A. It means 'stop.' Q. Has anybody under any circumstances any right to run that flag or the red light? A. No, sir. Q. If he don't get the white light, and suppose you keep him there six or eight hours, have they any right to run it? A. All they have to do is the right to report for holding them. Q. Have they the right to pass until it is taken down? A. No, sir. Q. Until it is down have they any right to run it? A. No, sir.

"Defendants' witness John A. Lisman testifies as follows: When no train has asked for signals or rails it stands at block for both roads, east, west, north, and south. When the train

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passes, and uses the derail, it should be put back to block. And an engine could not get to the diamond without the towerman doing something to give it to my train. It is not possible with an interlocker to give it to one road without taking it from the other, not in my knowledge."

Plaintiff recovered a verdict, and to reverse the judgment entered thereon defendants prosecute this writ of error.

Plaintiff's counsel contend that under the evidence "the towerman, in discharging the duties assigned him, was the representative of both defendants. His duties in this case were not the duties of a telegraph operator, but the duties of a train dispatcher. No train could cross the interlocker without his permission, he would hold any train he saw fit, or send any train over the diamond he saw fit, and if any train attempted to pass across the diamond without his consent it would be derailed, and if he saw fit to retain a train the only relief the trainmen had was to report him to the companies. His acts, therefore, were the acts of the defendants, and if he was negligent it was the negligence of the defendants."

We are unable to assent to this conclusion. The same view was adopted by the circuit court in the case of *L. S. & M. S. R. R. Co. v. Burtscher*, 8 Ohio Cir. Ct. R. (N. S.) 137. This view was rejected by the Supreme Court on appeal, and it was held that the towerman was the fellow servant of the engineer. *L. S. & M. S. R. R. Co. v. Burtscher*, 74 Ohio St. 523, 78 N. E. 1129. See, also, *Hydell v. Railway Co.*, 74 Ohio St. 138, 77 N. E. 1066. In our opinion, the duties of the towerman are more analogous to those of the local telegraph operator than to those of the train dispatcher, and the difference between him and a crossing switchman operating upon the ground and turning the switch lights by hand or giving signals with a lantern is one of degree and not of kind. The towerman, therefore, is ordinarily a fellow servant of the engineer. *Graham v. Railroad Co.*, 151 Mich. 629, 115 N. W. 993; *Dixon v. Gd. Trunk, etc., Ry. Co.*, 147 Mich. 667, 111 N. W. 200; *Pearsall v. Railroad Co.*, 189 N. Y. 474, 82 N. E. 752; *Tillson v. Railroad Co.*, 102 Me. 463, 67 Atl. 407; *C., C., C., etc., Ry. Co. v. Lawler*, 94 Ill. App. 36.

It is further contended by counsel for plaintiff, however, that, whatever the rule may be as to the relation between a towerman and an engineer in the employ of the same company, this case falls within the rule of *Kastl v. Wabash R. R. Co.*, 114 Mich. 53, 72 N. W. 28, where it was held that a switchman in the employ of a board composed of representatives of three railroad companies, to whose general control of a union depot, tracks, and yard the individual companies were subject, was not a fellow servant of a car inspector employed by one of the companies. So far as this record discloses, the station agent was the joint agent of the two companies, employed to perform for them the

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usual duties of station agents, with no general powers or authority to prescribe rules for or direct or control the performance of the duties of the towerman other than as the power to discharge might incidentally affect such performance. The rules for the guidance of the towerman were prescribed by the companies and not by the station agent, and he was the employee of the companies and each of them through the contract of hiring by the station agent for them. The mere power to hire and discharge employees does not constitute one a master or even the vice principal of the master. *Lepan v. Hall*, 128 Mich. 523, 87 N. W. 619; *Page v. Food Co.*, 142 Mich. 17, 105 N. W. 72. There was no such entire surrender of the management and control of the interlocker and signal system to the station agent as to render him the master of the towerman and bring this case within the principle of the *Kastl Case*.

The judgment is reversed, and a new trial ordered.

CHARLESTON & W. C. RY. CO. v. DEVLIN.

(Supreme Court of South Carolina, March 5, 1910.)

[67 S. E. Rep. 149.]

Pleading—Evidence Admissible—Written Instruments.—The court has a right, even in a law case, where an instrument of writing is introduced in evidence, although it was not mentioned in the pleadings, to declare it void so far as that action is concerned; hence evidence is admissible that such an instrument was obtained by misrepresentations.

Contracts—Misrepresentations as to Contents—Fraud.—Misrepresentations as to the contents and effect of a contract, whereby a person is induced to sign the contract without reading it, is an element of fraud.

Pleading—Objections—Mode.—An exception, assigning error to the action of the judge in allowing defendant to introduce evidence tending to establish fraud in the execution of an instrument, when such instrument is not specifically mentioned in the pleading, cannot be sustained, since the defect related to form, and should have been taken by motion to make more definite and certain.

Indemnity—Liability of Master for Willful Acts of Servant.*—Under a contract whereby defendant was granted permission to erect on plaintiff's right of way a warehouse, in consideration of which defendant covenanted that he would hold harmless the plaintiff from any damage or liability that might arise from the destruction of such warehouse by fire, whether the same should be attributable to the negligence of the employees of the plaintiff or not, defendant could not escape liability

*See second paragraph of first foot-note of *Jones v. Seaboard A. L. Ry. Co.* (N. Car.), 32 R. R. R. 139, 55 Am. & Eng. R. Cas., N. S., 139.

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to the railroad for the sum it was obliged to pay to owners of property stored, on the warehouse being burned by the negligence of the railroad, on a showing that the fire was caused by the reckless or willful misconduct of plaintiff's servants, though the reckless and willful misconduct of the railroad itself would be a good defense, since the doctrine of "*Qui facit per alium, facit per se*," has no application to willful acts of servants in such case.

Appeal from Common Pleas Circuit Court of Greenwood County.

Action by the Charleston & Western Carolina Railway Company against R. H. Devlin. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

S. H. McGhee and *S. J. Simpson*, for appellant.
Grier & Park, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the failure of the defendant to perform his part of the contract, entered into between said parties on the 20th of February, 1904, whereby the defendant was granted permission to erect, on the plaintiff's right of way, a house to be used for the storage of cotton seed, preparatory to shipment, in consideration of which, he covenanted and agreed as follows:

"First. That the party of the first part, will save and hold harmless the said company, its successors and assigns, from all damage, injury, or liability that may arise, from the destruction or injury of any building, improvements or personal property of any description, by fire or from any other cause whatever, whether the same should be attributable to the negligence of the employees of said company, or not, where such damage, injury, or liability is caused, increased or in any manner contributed to by reason of the use of the premises hereunder, and the party of the first part, agrees to insure and keep insured, for benefit of party of second part, the said building and contents, and all personal property on said lot.

"Second. The party of the first part, will save and hold harmless the company, its successors and assigns, from all damage to any person, that may partly or wholly arise from, or be traceable to the occupancy of said premises, by the party of the first part, or any other person, whether such damage be caused by the negligence of the company's employees, or from any other cause whatever."

The complaint alleges that the defendant erected and maintained the said warehouse up to the 30th of October, 1906, when it, and its contents, consisting, among other things, of cotton seed belonging to J. O. and E. O. Devlin, were destroyed by fire; that J. O. and E. O. Devlin recovered judgment against the plaintiff for the loss of said cotton seed, which it was compelled to

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pay; that the defendant failed to insure the warehouse and to perform his part of the contract. The defendant denied each and every allegation of the complaint, and set up the following defense: "That heretofore, on the 20th day of February, 1904, the defendant, at the request of the agent of plaintiff, authorized one of his sons to sign his name to the contract, which the agent of said plaintiff represented to him as a tenancy at will; the only purport and effect of which was that he, the said defendant, would be required under the terms of said contract to remove the buildings, which he had theretofore erected, on the right of way of the plaintiff, if the plaintiff should require the same, at any time thereafter, for its own use. The said defendant did not read the contract, and relied entirely upon the representation of the said agent. Defendant did not then know, and did not discover until after the fire, that the contract contained provisions whereby it was undertaken to make him liable for the negligence of the plaintiff; that the said contract was obtained from the defendant by misrepresentation as to its purport and character, and the defendant has been overreached by the plaintiff." He also sets up as a defense that the fire originated, not from the negligence of the railway company, but from its willful, wanton, and reckless misconduct. The jury rendered a verdict in favor of the defendant, and the plaintiff appealed.

The first exception assigns error as follows: "Because the presiding judge erred in allowing the defendant to introduce evidence tending to establish fraud and misrepresentation, when a defense of this character is not properly pleaded in the answer." When the plaintiff's attorney offered the contract in evidence, the defendant's attorney said: "We waive formal proof of the contract, but, of course, subject to our defense. We simply waive formal proof of the document subject to any other objections we have to it." There are several reasons why this exception cannot be sustained: In the first place, even in a law case, the court has a right, when an instrument of writing is introduced in evidence, although it was not mentioned in the pleadings, to declare it null and void in so far as that action is concerned. *McKenzie v. Sifford*, 45 S. C. 496, 23 S. E. 622. In the second place, the testimony was admissible for that reason that misrepresentation and deceit are elements of fraud. *Baldwin v. Cable Co.*, 78 S. C. 419, 59 S. E. 67; *Brown v. Tel. Co.*, 82 S. C. 173, 63 S. E. 744. Another reason is as follows: If the defect in a pleading relates merely to the form, the appropriate remedy is by motion to make definite and certain. The rule is thus stated in *Pom. Code Rem.* § 549: "The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect,

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incomplete, and defective, such deficiency pertaining, however, to the form rather than the substance, the proper mode of correction is, not by demurrer, nor by excluding evidence at the trial, but by motion before the trial to make the averments more definite and certain by amendment." The defect in the defense set up by the defendant related to the form, and not to the substance.

The next question that will be considered is whether the presiding judge erred in his construction of the contract when he charged the jury that the plaintiff could not recover damages if it appeared from the testimony that the fire was caused by the reckless or willful misconduct of its servants. The respondent's attorneys in their argument say: "The contract itself does not, we think, undertake to cover the wanton, willful, and reckless misconduct of plaintiff or its agents. In the first clause the words 'whether the same should be attributable to the negligence of the employees of said company or not,' and in the second clause the words 'whether such damage be caused by the negligence of the company's employees, or from any other cause whatever,' would, it seems to us, exclude any liability which might arise from the misconduct of the plaintiff—except negligence." The agreement on the part of the defendant to save the plaintiff harmless is couched in most comprehensive terms, and the words just quoted were unnecessary to make the defendant liable for negligence, as the general language was sufficient for that purpose; but they were intended to emphasize the fact that negligence on the part of the plaintiff's employees was included in the language already used in defining the defendant's liability. The relation which the plaintiff and its servants sustained towards each other is thus stated in *Mayer v. Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611, 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88; "The liability of the master to third persons does not depend upon any privity between him and such third persons. It is the privity between the master and servant that creates the liability of the master for injuries sustained by third persons, on account of misfeasance or nonfeasance of the servant or agent."

In a note to this case, after mentioning the confusion that has arisen from the failure to observe the dual relation which the servant occupies, it is said that it is "because they [text-book writers] do not distinguish between the direct liability of an agent or servant to third persons for breach of his own duty toward them, and an indirect liability to them for breach of duty to his employer, and fail to recognize or indicate the fact that an agent or servant may owe duties to third persons at the same time he owes service to his employer." This language is quoted with approval in the cases of *Ellis v. Railway*, 72 S. C. 465, 52 S. E. 228, 2 L. R. A. (N. S.) 378, and *Carter & Harris v. Railway*, 66 S. E. 997.

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In the case of *Street v. Ins. Co.*, 12 Rich. Law, 13, 75 Am. Dec. 714, it was held that insurers are liable for damage to an insured vessel, caused by a collision at sea, that being a peril against which they insured, although the collision was the result of negligence on the part of the master and crew of the vessel insured, even though such negligence was not a peril included in the policy. In that case the court said: "Cases both in England and the United States, have firmly established the doctrine that if the vessel is seaworthy, and the master and crew competent, no negligence of the master and crew, not barratrous, which leads to a peril within the policy, constitutes a defense for the insurance against their responsibility for the damage, done by that peril.

* * * They [the insurers] have not insured against negligence, and therefore for damage of which negligence is the immediate cause they will not be answerable; but, when a peril of the sea has been an immediate cause, and could have been operative whether there had or had not been negligence, the law does not create an exception which is not in the words of the policy, and all inquiry beyond the peril is superfluous. * * * In the case before us the insurers were properly held answerable for the hurt received by the *St. Andrew*, for that came from collision, and, to recover for it nothing but collision need have been averred"—thus showing that, if the vessel was injured, in consequence of a collision (which was a peril against which it was insured), the insurance company was liable even though the collision was brought about by negligence on the part of the insured, as it made no difference from what cause the collision occurred. Applying these principles to the present case, it was immaterial, from what causes the fire originated, provided it was not the result of reckless or willful misconduct on the part of the plaintiff, as it would be against public policy for him to recover if the injury was caused by his own recklessness or willfulness. But this exemption from liability does not extend to acts of wantonness or recklessness on the part of the plaintiff's servants, as they owed him a duty, against the breach of which he had the right to insure, and, in such cases the doctrine "*Qui facit per alium, facit per se*," has no application.

These views practically dispose of all the exceptions.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* JONES.

(Supreme Court of Texas, Feb. 23, 1910.)

[125 S. W. Rep. 309.]

Master and Servant—Injuries to Servant—Negligence—Evidence—Sufficiency.—In an action for injury to a switchman, who in alighting from an engine stepped on a bolt and was thrown, evidence held insufficient to show that any of defendant's employees were negligent.

Master and Servant—Injuries to Servant—Negligence—Knowledge of Defect.—In an action for injury to a switchman, who in alighting from an engine stepped on a bolt and was thrown, to constitute negligence on the part of defendant's employees, the bolt must have been put on the track by some employee, or its presence there must have been known to some of them before the accident, or must have continued long enough to justify the inference that the failure to know it was due to a want of proper care.

Master and Servant—Injuries to Servant—Negligence—Presumption.*—In an action for injury to a switchman, who in alighting from an engine stepped on a bolt and was thrown, it could not be presumed that defendant was negligent without evidence that it had such complete control of every part of its yards and of every bolt of which it was the owner as to make it reasonable to infer that its servants, contrary to their duty, either put the bolt at this place, or negligently allowed it to be there when they knew or should have known of its presence, rather than that it may have come there without their fault, since it would contradict common experience, which is the basis of presumptions of fact.

Master and Servant—Injury to Servant—Negligence—Presumptions—Difficulty of Proof.*—Nor would the fact that it would be difficult for plaintiff to show more than he had taken away the requirement of evidence to warrant a judgment, since it would be equally difficult for defendant to account further than it had done, and no such consideration can sustain a judgment based upon evidence as consistent with the innocence as with the guilt of defendant and its servants.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by J. P. Jones against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff was affirmed

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that an employee is injured, see third foot-note of *Kiley v. Rutland R. Co.* (Vt.), 27 R. R. R. 415, 50 Am. & Eng. R. Cas., N. S., 415; foot-note of *Louisville & N. R. Co. v. Caldwell* (Fla.), 33 R. R. R. 560, 56 Am. & Eng. R. Cas., N. S., 560.

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by the Court of Civil Appeals (117 S. W. 1000), and defendant brings error. Reversed and judgment rendered.

Coke, Miller & Coke and Tyler & Tyler, for plaintiff in error.
A. L. Curtis and Winbourne Pearce, for defendant in error.

WILLIAMS, J. The principal question in this case is whether or not the evidence relied on by defendant in error (plaintiff) is sufficient to show negligence on the part of the plaintiff in error (defendant). Plaintiff's counsel rely mainly on the principle *res ipsa loquitur*, as it has been stated in many decisions in this state and elsewhere.

The injury for which plaintiff sues was received in this way: As a switchman in the service of defendant in its yards at Temple, he rode on the footboard of a slowly moving engine until it reached a point at which it was his duty to get off for the purpose of throwing a switch, and, in doing so, he stepped upon an iron bolt eight or ten inches long and an inch thick, which rolled under his foot in such manner as to throw him down across one of the rails, and caused the injuries for which he recovered. The bolt was lying upon the track at a place where switching was constantly done, and it is virtually admitted in the evidence that the presence of such an object would render the track dangerous for such uses as switchmen are expected to make of it. The only evidence of its presence is the testimony of plaintiff which goes only to the fact that it was there when he stepped on it. It is shown that the bolt was such as is used by defendant and other companies in holding in place the draft timbers of cars. Such bolts were often taken out of cars by the repairers in the yard at Temple. This was usually done upon the repair track, but the chief repairer, without any recollection of such a fact, admitted the possibility of his having at some time taken out one on the track in question. He stated, however, that he had never left a bolt upon a track, but always removed and put them in the scrap pile where old irons were kept. It was shown to have been the duty of the chief repairer and his assistant to pick up pieces of iron when seen anywhere about the yards, and put them in the scrap pile to be put to other uses; but, while the evidence justifies the inference that such things were often found, there is none that at any time before that in question one was ever seen on a track or at any other place where it would endanger employees. Nor is there any evidence that any car was worked upon on the track in question on or before the day of the accident, unless the fact that the bolt was there be such. The repairers stated that they had no knowledge of such a fact. It was the especial duty of the foreman of the section, including these yards, and of the track walker employed therein, to look after the condition of the tracks, and to keep them free of such obstructions. Each of them testified that he started upon his first round of in-

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spection at 7 o'clock each morning, and did so on the morning in question, passing over the point where the bolt was afterwards found less than an hour before plaintiff was hurt; that it was his duty to keep a lookout for such objects; and that, if one had been there, he would have seen and removed it, as it was his duty to do. The chief car repairer and his assistant, whose duties did not include that of inspecting the track, but did require them to pick up and put in the scrap pile such irons as they saw while performing other services, also testified to passing the place about the same time, and of having no recollection of seeing the bolt. There was testimony from others who passed there to a like absence of recollection. One of the witnesses, speaking of the bolt, says that: "From the way this one looks it had been covered up for quite awhile so no one could have seen it." What this indicates or what appearance the bolt could have had that would tend to show how it came to be on the track we are unable to see.

We cannot bring our minds to the conclusion that there is here any evidence to prove that any one of the defendant's employees was guilty of negligence. In order to constitute it, the bolt must have been put on the track by some employee, or its presence there must have been known to some of them before the accident, or must have continued long enough to justify the inference that the failure to know it was due to a want of the proper care.

It is not contended, nor could it be, that inspections were not frequent enough. It could not reasonably be required that either the foreman or the track walker should have passed this point a second time before the accident. Does the fact that a half hour or so after they passed the bolt was found upon the track justify an inference of negligence of which there is no other evidence? Undoubtedly a condition of a track might be such that with respect to it such a question ought to be answered in the affirmative; but that cannot be true of this condition, which might come about at one moment as well as another and by the action of others as well as by that of defendant's servants. Any person, child or adult, passing the point, idly handling or playing with and dropping the bolt, might, in an instant, have put it in the place in which alone it was dangerous. Other ways in which it might have come there might easily be supposed. It is true that the evidence does not especially indicate any such explanation of its presence, but the point is that that which happened may be as easily accounted for in this way as by a supposition of negligence on the part of the defendant. Such a supposition would imply that some servant of defendant put the bolt on the track or knew it was there, or that more than one of them negligently failed to see it when passing along the track and looking out for such things, or that, seeing it, they failed to remove it, each of which assumptions would involve a charge of a motiveless disregard of a positive and simple duty easily performed. The argument is

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that the track and the bolt belonged to and were in the exclusive control of the defendant; that its duty to its employees was to exercise care to keep the track safe; that the track was found in an unsafe condition, whereby an injury was caused which would not ordinarily happen if that duty were performed; and that this condition of things, under the decisions relied on, justifies an inference of negligence. *Washington v. Railway*, 90 Tex. 314, 38 S. W. 764; *McCray v. G., H. & S. A. Ry. Co.*, 89 Tex. 168, 34 S. W. 95.

It may be remarked that the doctrine recognized in those decisions is that a state of evidence such as it supposes justifies a finding of negligence when there is no sufficient evidence adduced by the defendant to show that the injury was not in fact due to its fault. *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 39 Atl. 292, 39 L. R. A. 842, 63 Am. St. Rep. 807. It does not throw upon the defendant the burden of satisfactorily accounting for the accident. But we cannot agree that it applies to a state of facts like this at all. It cannot be presumed without evidence that the defendant had in fact such complete control of every part of its yards and of every bolt of this kind of which it was the owner as to make it reasonable to infer that its servants, contrary to their duty, either put this bolt at this place, or negligently allowed it to be there when they knew or should have known of its presence, rather than that it may have come to be there without their fault. Such a presumption would contradict common experience, and common experience is the basis of presumptions of fact. It may be true that it would be difficult for a plaintiff to show more than plaintiff showed concerning such a condition, but this does not take away the requirement of evidence to warrant a judgment. 6 Thompson, Neg. 7695. It would seem that the difficulty would be equally as great for the defendant to account further than it has done, but, however that may be, no such consideration can sustain a judgment based upon evidence which is as consistent with the innocence as with the guilt of the defendant and its servants. *Id.* 7698. The judgment will be reversed, and, as the case has probably been fully developed, judgment will be here rendered that plaintiff take nothing.

Reversed and rendered.

GASKINS v. SOUTHERN RY. CO. *et al.*

(Supreme Court of North Carolina, Sept. 15, 1909.)

[65 S. E. Rep. 518.]

Carriers—Carriage of Goods—Control of Goods—Action against Carrier—Persons Entitled to Sue.—Where the seller delivers an article to the carrier for transportation by the usual route on an open bill of lading, title passes to the vendee or assignee, so that the seller could not sue for their injury en route unless he specifically retained title by requiring the goods to be delivered to his order, etc.

Appeal from Superior Court, Beaufort County; Peebles, Judge.

Action by C. H. Gaskins against the Southern Railway Company and another. From a judgment for plaintiff, defendant named appeals. Reversed and action dismissed.

This action was brought against the defendants, the Atlantic Coast Line Railroad Company and the Southern Railway Company, to recover damages for injury to a soda fountain, which was delivered by the plaintiff to the first named company at Grifton, N. C., to be shipped via Selma, N. C., to J. C. Reitzel at Liberty, N. C., a station on the Southern Railway. When it was delivered for shipment, the soda fountain was in good condition. The plaintiff alleged in his complaint "that the soda fountain and fixtures were his property, and, by the agreement with J. C. Reitzel, the consignee, they were to remain his property until accepted and paid for by Reitzel." This allegation was denied in the answer of the defendant, and there was no evidence to sustain it; it appearing only that the fountain and its fixtures were shipped under an open bill of lading, which was issued by the Atlantic Coast Line Railroad Company to the plaintiff.

The court submitted issues to the jury, which, with the answers thereto, were as follows:

"In what sum, if any, is the defendant A. C. L. Railroad Company indebted to the plaintiff? Answer. \$20.

"In what sum, if any, is the defendant Southern Railway Company indebted to the plaintiff? Answer. \$250."

It appeared that the ice shaver was damaged while the fountain was in the possession of the Atlantic Coast Line Railroad Company, and the defendant did not appeal from the judgment for the amount assessed by the jury against it for said damage. The evidence tended to show the following facts: The Atlantic Coast Line Railroad Company has a "line of track" from Grifton to a point beyond Selma and the Southern Railway Company has a "line of track" which crosses the line of its codefendant at Selma, and extends beyond that place. The two companies re-

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ceive and deliver freight at Selma from and to each other. This statement is taken from the answer of the Southern Railway Company, which was in evidence. The bill of lading issued to the plaintiff by the Atlantic Coast Line Railroad Company was also in evidence. C. H. Gaskins testified in behalf of the plaintiff as follows: "I helped to crate the property. It was in perfect condition, and worth two hundred and eighty-five dollars (\$285). It was delivered to the Atlantic Coast Line Railroad Company at Grifton for transportation to Liberty, N. C. I last saw the property in the warehouse of the Atlantic Coast Line at Grifton about sixty (60) days after it had been shipped. I only saw the top and end of the fountain on its return. The agent objected to my examination. The marble was broken all to pieces. The ice shaver was missing. The ice shaver was worth twenty-two dollars and fifty cents (\$22.50). I know as a fact that the fountain started to Liberty. I do not know whether it ever got there." At the close of this testimony, the defendant Southern Railway Company moved to nonsuit the plaintiff. The motion was overruled and an exception entered.

J. A. Spiers, a witness for the Atlantic Coast Line Railroad Company, testified as follows: "This shipment was received at Selma March 12, 1908. I delivered it to the Southern Railway Company. The wheel to the ice shaver was in bad condition." At the close of all the testimony the defendant Southern Railway Company renewed its motion to nonsuit, which being overruled it excepted.

The court charged the jury as follows: "The agent at Selma shows delivery of the fountain to the Southern Railway Company on March 12th in good condition, with the exception of damage to the ice shaver. [If you believe that the Atlantic Coast Line Railroad Company delivered the property to the Southern Railway Company at Selma in good condition, that would put the burden on the Southern Railway Company to show delivery in good condition at the point of destination. If you believe the testimony, you will assess the damage to the ice shaver against the Atlantic Coast Line Railroad Company and the balance of the damage against the Southern Railway Company.] You cannot give against the Southern Railway Company more than two hundred and sixty-two dollars and fifty cents (\$262.50) damages. You are not bound to give plaintiff the amount of damages demanded by him." The Southern Railway Company excepted to that part of the charge in brackets. There was a motion for a new trial which was denied. Judgment was entered upon the verdict, and the Southern Railway Company excepted and appealed, assigning errors as follows: (1) That the court erred in refusing the motion to nonsuit. (2) That there was error in the part of the charge to which exception was taken.

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W. B. Rodman, R. G. Lucas, and J. H. Pou, for appellant.
W. C. Rodman, for appellee.

WALKER, J. It appears in this case that the fountain was delivered to the carrier by the plaintiff, who had sold it to Reitzel, and who received from the carrier an open bill of lading, by which the latter agreed to transport and deliver the fountain to the consignee, Reitzel, at Liberty, N. C., the shipment to be made over the lines of the two defendants. The case, therefore, is governed by the principle settled by this court in *Stone v. Railroad*, 144 N. C. 228, 56 S. E. 932, and *Manufacturing Co. v. Railroad*, 149 N. C. 261, 62 S. E. 1091. In the former of these cases we held it to be "undoubtedly true that, in the absence of any suggestion that the goods were not shipped 'open,' the delivery to the carrier taking a bill of lading to the consignee vests in the consignee the title to the goods, making the carrier liable to him for failure to transport and deliver. 'Prima facie the consignee is the owner of the goods in transit, the property therein vesting in the consignee upon delivery to the carrier, and he only can sue the carrier for nondelivery, though a receipt was given to the consignor. The carrier is entitled to consider and bound to treat the consignee as such owner, unless it is advised that a different relation exists, or unless notice of such fact is to be implied from the manner of shipment, as when goods are sent C. O. D.' Moore on Carriers, 188; Tiffany on Sales, 195; Crook v. Cowan, 64 N. C. 743; State v. Patterson, 134 N. C. 612, 47 S. E. 808; Ober v. Smith, 78 N. C. 316." In the latter case the doctrine was thus stated: "It is common learning that when the vendor delivers an article to the common carrier to be transported by the usual route to the vendee, taking an open bill of lading, the title to the article passes to the vendee or consignee. This is true, although, by the terms of the sale, the vendee is to pay cash. For an injury to an article while in transit, or delay in transportation or delivery, the carrier is liable to the consignee. *Stone v. Railroad*, 144 N. C. 220, 56 S. E. 932."

The case of *Stone v. Railroad* was approved in *Cardwell v. Railroad*, 146 N. C. 218, 59 S. E. 673, in the following language: "When goods are delivered to a common carrier for transportation, and a bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue as the 'party aggrieved' for the penalty given by section 1467 (2632), Revisal. This is undoubtedly a correct decision applying, as stated, where it appears that goods are shipped and the bill of lading taken to a consignee without more."

If the plaintiff had shipped the fountain and taken a bill of lading requiring it to be delivered "to his order," or had retained the title and control of the fountain in any other way, he would be entitled to recover for any damage to the property, or for any

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delay or other default of the carrier. He alleges, it is true, in his complaint, that he retained the title, but this allegation is denied by the defendant, and there was no proof to sustain it, and we must conclude, therefore, that there was no agreement with the carrier or the consignee to prevent the application of the ordinary rule which we have stated. If the plaintiff can show in another action that he retained the title to the fountain, he will be in a position to sue for any breach of contract by the defendant and recover the damages to which he may be entitled. We do not consider the other questions debated before us, for the reason that upon the record and the case, as they now appear, the court erred in refusing to sustain the motion for a nonsuit and dismissing the action.

Action dismissed.

CORINTH ENGINE & BOILER WORKS v. MISSISSIPPI CENT. R. CO.

(Supreme Court of Mississippi, May 17, 1909.)

[49 So. Rep. 261.]

Carriers—Carriage of Goods—Shipment by Other than Owner—Right to Hold for Freight Charges.—Goods were sold with a reservation of title in the seller until payment of purchase-money notes, and before payment of all of them a third person, lawfully in possession, delivered the goods for transportation to a carrier without the seller's knowledge or consent; the carrier being ignorant of the seller's claim. Held that, upon the consignee's failing to call for the goods, the carrier could not withhold possession thereof from the seller until payment of freight and demurrage charges, since a person cannot be divested of his personal property without his consent, express or implied.

Appeal from Circuit Court, Jefferson Davis County; R. L. Bullard, Judge.

"To be officially reported."

Action by the Corinth Engine & Boiler Works against the Mississippi Central Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

Conn & Warriner, for appellant.

Jeff Truly, for appellee.

WHITFIELD, C. J. The appellant sold to one Kirby certain machinery and took installment notes for the purchase price, in which this clause occurs: "The express condition of the sale and purchase of said machinery for which this note is given is such that the title, ownership, or possession does not pass from

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said Corinth Engine & Boiler Works until this note, with interest is paid in full." In other words, the notes reserved the title, ownership, and possession until payment in full. The case was submitted to the judge upon an agreed statement of facts, after certain preliminary proceedings had been had. That agreed statement of facts is as follows:

"The Corinth Engine & Boiler Works, a Mississippi corporation, with its principal office in Corinth, in said state, sold in May, 1906, a car load of machinery to one E. O. Kirby, and said Corinth Engine & Boiler Works shipped said machinery, consisting of one engine and boiler and sawmill outfit, to said E. O. Kirby, at Hattiesburg, Miss. The Corinth Engine & Boiler Works took from said Kirby a contract of sale, signed by the vendee, and in said contract retained title and ownership in and to all of said outfit until all of the notes given by Kirby for said machinery should be paid in full; the notes amounting in all to the sum of \$1,250. In November, 1907, one J. N. Kirby delivered said car load of machinery to the Mississippi Central Railroad Company, defendant in this suit, for shipment from Epley, Miss., to White Sand, Miss.; the same being consigned to J. N. Kirby. That said shipment was made before all of said notes had been paid by said E. O. Kirby (Kirby had paid about \$300.00), and without plaintiff's knowledge or consent, and while plaintiff still held, in accordance with its contract of sale, the title. The Mississippi Central Railroad Company shipped the machinery from Epley to White Sand, and, the consignee, J. N. Kirby, failing to call for same, the railroad company held the machinery for freight and demurrage until it was turned over to Corinth Engine & Boiler Works, plaintiff herein, in accordance with their bond filed in this the present suit. At the time the Mississippi Central Railroad Company received the machinery for shipment, it did not know of plaintiff's title claim, and received the freight from one lawfully in possession thereof, and offered to surrender the same upon payment of freight and demurrage charges. The sole question to be decided being whether plaintiff can recover in this suit without paying freight and demurrage charges due the defendant. Jeff Truly, Attorney for Defendant. Conn & Warriner, Attorneys for the Plaintiff."

The principle which must control this case is well settled, and is thus expressed in 2 Hutchinson on Carriers (3d Ed.) § 884: "In this country the law upon the question does not seem to be so well settled. But few cases have occurred, it seems, in regard to the right of innkeepers, under such circumstances, to retain the property of another, brought to the inn by a guest. Whenever the subject has been referred to, it has been conceded that the lien in favor of the innkeeper attaches to the goods, even when not owned by the guest. But it has been held in several cases that a carrier acquires no right, by virtue of his employ-

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ment as such, to hold the goods delivered to him by a wrongdoer, to whom they do not belong, until his charges are paid, against the claim of the true owner, and that he therefore has no lien upon them, but must, on demand, surrender them to the owner. This rule is based upon the universally recognized principle that no person's property can be taken from him without his consent, expressed or implied. It is not a harsh rule, as applied to common carriers, since they always have the right to demand of the consignor their transportation charges in advance; and the rights of a connecting road are no better in this respect than those of the initial carrier."

In the case of *Robinson v. Baker*, 59 Mass. 137, 51 Am. Dec. 54, the court said: "Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541, it is said: 'The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor.' There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use, by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in possession of any person, however innocent. Upon this settled and universal principle that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others, apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants upon pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgors have been subject to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of caveat emptor apply to him? The reason, and the only reason, given is that he is obliged

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to receive goods to carry, and should therefore have the right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance."

The case relied upon by the learned counsel for appellees, *Vaughn v. Providence & Worcester Railroad Company*, 13 R. I. 578, cited in note 72 to *Hutchinson on Carriers*, § 885, is not in point on the facts of this case. That case is noted in the note to *Savannah, etc., Railroad Company v. Talbot*, 3 Am. & Eng. Ann. Cas. 1092, as appearing to be an exception to the general rule. The editor of that note says at the close of the note: "This case appears to be an exception to the general rule; but the decision was arrived at in view of the peculiar facts of the case, as the court recognized the rule under consideration." The editor further says: "The mistake was that of the initial carrier, who was the agent of the consignee." It seems to us very clear that the *Vaughn Case* was properly decided on its facts, and it was so decided, as we read the case, because the owner himself, living at Providence, directed the last carrier, the Providence & Worcester Railroad Company, which had paid to the Chicopee Railroad Company its charges, to bring the freight, the cotton, from Chicopee, Mass., to Providence, R. I.; and yet when the Providence & Worcester Railroad Company had so transported the cotton from Chicopee to Providence, the said owner, who had himself directed the transportation to Providence, refused to pay the Providence & Worcester Railroad Company its charges. The court said in the conclusion of its opinion, at the bottom of 13 R. I. 581: "The cotton arrives at Chicopee, the place of its destination by the bill of lading which accompanied it. The owner is informed of it, as directed by the bill of lading. No person but the owner had any authority to send it further. But for the owner's direction the Chicopee Railroad Company must have held it. They knew of no other destination. They had notice by the bill of lading that the owner had given no authority to send it to any other place. * * * They did as directed by the bill of lading—notified the owner and waited his orders." In other words, the court held very properly that the owner was bound to pay the Providence & Worcester Railroad Company for its charges from Chicopee to Providence for the very sufficient reason that he himself had directed the Providence Railroad Company to transport the cotton to Providence. That case has no sort of application here.

In the case of *Savannah, etc., R. R. Co. v. Talbot*, just referred to, the court say, at page 1094: "The liability in such case is on

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the principle that the true owner of personal property has the right to the possession of his property, which has been fraudulently taken from him, even though it be found in the possession of an innocent purchaser; and in such cases the true owner is not liable for any expenses to which the person in possession may have been put, either in the purchase of the property or otherwise." In the note to this case the following is quoted from *Fitch v. Newberry*, 1 Doug. (Mich.) 14: "No one can transfer to another a better title than he has himself, or a greater interest in personal property than he, or the person for whom he acts, possesses. * * * To create a lien it is necessary that the party vesting it should have the power to do so. A person can neither acquire a lien by his own wrongful act, nor can he retain one, when he obtains possession of goods without the consent of the owner, express or implied." In the case of *Owens v. Burlington*, etc., R. R. Co., 11 S. D. 153, 76 N. W. 302, 74 Am. St. Rep. 786, the court say: "Knowledge of such proposed shipment, and the fact that respondents allowed the mortgagors to remain in possession, and to move the property from place to place for use within the state, is not equivalent to consent upon their part that the lien of appellant should be paramount to this mortgage, and there is nothing in the record amounting to a waiver of their rights thereunder. By waiving its statutory right to demand and receive its charges in advance of the shipment, appellant exposed itself to the risk here encountered, and its lien cannot be regarded superior to the mortgage without violating the fundamental principle that no man can be divested of his personal property without his consent, express or implied. If the rule were as contended for by appellant, a chattel mortgage would afford but scanty security, and the common carrier would be, without an obvious distinction upon principle, relieved from a hazard to which other persons in business are constantly subjected. The doctrine upon which this decision must rest was fully recognized and applied in *Wright v. Sherman*, 3 S. D. 290, 52 N. W. 1093, 17 L. R. A. 792, a case which is amply supported by well-reasoned ancient and modern authority." To the same effect are the following authorities: *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208, *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13, and many others which need not be cited.

This is merely one of many other cases which, in our judgment, shows the necessity for requiring all reservations of titles to personal property to be recorded. We trust that the Legislature will pass such a law speedily.

The result is that the judgment of the court below is reversed, and a judgment will be entered here for the appellant.

CHESAPEAKE & O. RY. CO. v. LAVIN.

(Court of Appeals of Kentucky, Jan. 6, 1910.)

[124 S. W. Rep. 274.]

Carriers—Delivery of Goods to Consignee—Authority to Forward from "Destination."—The "destination" of goods is the place of delivery, and a carrier has no right, without authority from the consignee, to deliver them to another for him; but if it is the custom for the carrier to forward goods by boat from their destination on its line, and the consignee knew this when he ordered goods shipped, and the owner of a boat has previously received goods for him from the carrier and delivered them, the carrier is authorized to deliver the goods to such owner for transportation by boat to the consignee.

Carriers—Damages to Goods—Crediting Proceeds of Sale.—In allowing damages to a consignee of goods, the carrier should be credited with the amount realized from a sale of goods for the benefit of the consignee's creditors.

Appeal from Circuit Court, Floyd County.
"To be officially reported."

Action by J. P. Lavin against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Walter S. Harkins, Worthington, Cochran & Browning, F. T. D. Wallace, and Joseph D. Harkins, for appellant.

May & May, for appellee.

SETTLE, J. This is an appeal from a judgment for \$643.65, recovered by appellee against appellant in the court below upon a claim for damages of that amount on account of the alleged conversion or destruction, by the appellant or its agents, of a box of merchandise which had been shipped over its railroad to appellee from Knoxville, Tenn. The box of merchandise, consisting of men's and boys' clothing, was purchased by appellee of Claiborne, Tate & Cowan, of Knoxville, and shipped to him from that city over a line of railroad under the control of the Louisville & Nashville Railroad Company, to Winchester, Ky., and from that city over appellant's line of railroad to the village of Whitehouse, the point of destination.

Appellee was a country merchant, his residence and store at that time being at Dwale, a post office situated in Floyd county, upon the Big Sandy river, about 30 miles from Whitehouse. There is no railroad from Whitehouse to Dwale, and, the public roads between those points being mountainous and practically impassable for wagons, the only way of transporting merchandise

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or other freight from one of these points to the other is by the boats running the Big Sandy river; both small steamboats and "pushboats" being used for that purpose. The pushboat is a flat boat operated by poles in the hands of experienced boatmen. The Big Sandy river is a swift, though rather shallow, mountain stream, subject to sudden rise and fall. Much of the time its depth is not sufficient for the running of steamboats, but is always sufficient for the operation of pushboats. It often happens, however, that a sudden rise in the river will stop the running of pushboats up stream, as in such case the unusual force of the current resulting from the increase in the volume of water becomes too great for the boats to be propelled against it by pushing. When the pushboats are caught by these rises, they make a landing and tie up until the river runs down to such a stage as will enable them to proceed; but if while one of the pushboats is tied up, a steamboat passes going to the same point of destination, it is the custom for the freight of the pushboat to be transferred to the steamboat for further transportation and delivery to the consignees, by which arrangement, without additional cost, a quicker delivery of such freight would result than would be accomplished by the pushboat.

It appears from the record, and is conceded by the parties, that Whitehouse was the place where appellant, as common carrier, was to deliver, and appellee was to receive, the box of goods in question, and after reaching Whitehouse the goods had to be transported to appellee's store, at Dwale, by boat. It is appellee's contention, and such was his testimony on the trial: That appellant's only duty was to safely carry the goods to Whitehouse and there deliver them to him, or upon his written order to whomsoever he might constitute his agent to receive them; that appellant did not deliver the goods to him or to another upon his order or hold them until he could go or send for them, but, instead, delivered the goods, without his knowledge or consent, to one G. Wells, to be transported by his pushboat to appellee's store at Dwale; and that Wells, or a steamboat to which he transferred the goods, suffered them to fall into the Big Sandy river and remain in the water several hours, thereby so injuring the goods as to render them unsalable and utterly worthless. Appellee also contends, and to this effect he likewise testified on the trial, that he owned a pushboat which he in his own business operated upon the Big Sandy river, and by means of which it was his purpose to transport the goods in question from Whitehouse to his store at Dwale, that Wells had never transported goods for him by boat or otherwise, and had never been authorized by him to do so.

Appellant, by answer, supported by the testimony of its Whitehouse station agent, and Wells, interposed the defense: That Wells, who operates for hire pushboats on Big Sandy river, was

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engaged as a common carrier in transporting merchandise and other freight from Whitehouse to Dwale and other points up the river; that Wells had on two or three previous occasions carried upon his boats goods from Whitehouse to Dwale for appellee; and that it was the custom of merchants and others residing at Dwale and other places up the Big Sandy river to employ Wells and other boatmen to receive for them at Whitehouse and transport to them upon pushboats to points up the river, merchandise and other freight shipped over appellant's railroad and consigned to them at Whitehouse, which custom had prevailed among merchants and others on Big Sandy river above Whitehouse for 15 or 20 years. Appellant's testimony further tends to prove: That the box of clothing shipped to appellee, after reaching Whitehouse, remained in its freight depot eight days, and, though appellee had due notice of the time of its arrival at Whitehouse, he failed to call for it in person or send his boat for it; that at that time there were as many as 200 merchants and others residing and doing business upon and contiguous to Big Sandy river whose goods and freight were shipped to and received at Whitehouse and from there carried by steam or pushboats to the consignees; that, in order to accommodate these merchants and shippers and prevent a congestion of freight at its Whitehouse station, it was indispensably necessary for appellant to follow the custom of delivering to boatmen goods and freight to be carried up the river by both steam and pushboats; that, after holding appellee's box of goods eight days, appellant's agent, in pursuance of the custom referred to, and because of the previous taking by Wells of goods for appellee, turned the box of goods over to Wells at his solicitation and took his receipt therefor, upon his undertaking as a common carrier to transport them by boat to Dwale and there deliver them to appellee; that Wells thereupon placed the box of goods with other freight upon his pushboat and started with it to Dwale; but that while proceeding on the way there came such a freshet or rise in the waters of the Big Sandy river that Wells was forced to land and tie up the boat, and while awaiting the subsidence of the high water a small steamboat, known as the "Sea Gull," with a lighter in tow, came along, and in pursuance of the well-known custom obtaining among the boatmen on the river and their patrons, and in order to insure a safer and quicker delivery to appellee of the box of goods, Wells made an arrangement with the captain of the Sea Gull to take the box of goods and deliver them to appellee at Dwale. The box was then transferred to the lighter attached to the Sea Gull, and soon thereafter, in a collision between the Sea Gull and the Dr. York, another steamboat plying the river, the lighter was capsized, and appellee's box of goods thrown into the river, where it remained about three hours, and was then recovered by the crew of the Sea Gull and soon thereafter delivered at appellee's store at Dwale.

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Upon the foregoing facts the jury returned a verdict in favor of appellee for the amount claimed in the petition. Appellant complains that the jury were not properly instructed, and that this error of the court entitled it to a new trial.

As Whitehouse was the destination of the box of goods shipped appellee, that was the place of delivery, and appellant had no right without authority, express or implied, from appellee, to deliver them to another person for him. If, however, it was the custom for appellant to forward goods consigned to Whitehouse to appellee, by boat passing on the river, and appellee knew this when he ordered the goods shipped, and Wells was one of the persons who had previously received goods for him from appellant at Whitehouse and delivered them to him at his store, appellant was, in that event, authorized to deliver the goods to Wells for transportation by boat to appellee at Dwale.

The instructions given by the trial court do not sufficiently conform to this view of the law, and in the form given they were prejudicial to the substantial rights of appellant. Upon a retrial of the case the jury should be instructed as follows:

No. 1. The court instructs the jury that if they believe from the evidence plaintiff bought from Claiborne, Tate & Cowan the box of clothing mentioned in the petition, and the same was shipped and consigned to plaintiff at Whitehouse, Ky., and that the defendant received same for shipment and delivery to the plaintiff at Whitehouse, Ky., and further believe from the evidence that defendant after receiving said box of clothing failed to deliver it to the plaintiff at Whitehouse, or there delivered it to another person without authority, express or implied, as set out in instruction No. 2, from plaintiff so to do, they should find for plaintiff the value of the box of clothing as set out in the petition, to wit, \$643.65.

No. 2. If, however, the jury should believe from the evidence it was the custom for the defendant to forward goods consigned to Whitehouse to plaintiff by boat passing on the river to Dwale, and plaintiff knew this, when he ordered the goods shipped, or if they believe from the evidence that there had been previous deliveries from the defendant to Green Wells, for transportation by his line of boats to Dwale, goods consigned to Whitehouse to plaintiff, and plaintiff had received the same from Wells without objection to defendant of their being delivered to Wells for him, they should, in either of these events, find for the defendant; provided they further believe from the evidence that the goods were delivered to Wells at Whitehouse by the defendant as previous consignments had been delivered for transportation by boat to plaintiff.

It is insisted in the brief of counsel for appellant that the box of clothing was not rendered wholly unsalable by their falling in the river, and that the clothing was in fact sold for the

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benefit of appellee's creditors in a proceeding growing out of his insolvency, at which sale they brought nearly \$400. No proof of such sale of the goods is furnished by the record. If, upon another trial of the case, it should be shown by proof that the goods were thus disposed of, the jury should be instructed that, if they find that appellee is entitled to recover as claimed in the petition, appellant should in that event be allowed by them credit for the amount realized for the goods at such sale.

As no objection was made by appellant in the court below, and none is now urged, as to the right of appellee to proceed against it by cross-petition in an action brought against him by Claiborne, Tate & Cowan, for the value of the goods in controversy, we have deemed it improper to consider or pass upon that matter.

For the reasons given, the judgment is reversed, and cause remanded for a new trial consistent with the opinion.

CARTER v. CHICAGO, M. & ST. P. R. Co.

(Supreme Court of Iowa, Feb. 19, 1910.)

[125 N. W. Rep. 94.]

Carriers—Connecting Carriers—Liability.*—A common carrier is not liable for the negligence of a connecting carrier in delaying a shipment of live stock in the absence of a contract, express or implied, or of a partnership or traffic agreement which makes the two lines practically one.

Carriers—Connecting Carriers—Liability—Evidence.—The acceptance of goods by a carrier, marked to a point beyond the terminal of its line, creates a prima facie liability to deliver at the point of destination.

Carriers—Connecting Carriers—Bill of Lading—Delay in Transportation.*—Where a carrier issues a bill of lading for the transportation of goods to a destination beyond its own line, it binds itself to deliver at the point of destination, and is liable for delays of a connecting carrier, unless there be some limitation in liability in the bill of lading.

Carriers—Contract for Through Shipment—Evidence.—A contract for through shipment may be upheld from the circumstances surround-

*See foot-note of *St. Louis, etc., Ry. Co. v. Randle* (Ark.), 29 R. R. R. 323, 52 Am. & Eng. R. Cas., N. S., 323; second foot-note of *Illinois Cent. R. Co. v. Curry* (Ky.), 29 R. R. R. 295, 52 Am. & Eng. R. Cas., N. S., 295; foot-note of *Moody v. Southern Ry. Co.* (S. Car.), 28 R. R. R. 706, 51 Am. & Eng. R. Cas., N. S., 706; second foot-note of *St. Louis, etc., R. Co. v. McGivney* (Okl.), 26 R. R. R. 702, 49 Am. & Eng. R. Cas., N. S., 702; first foot-note of *Roy v. Chesapeake & O. Ry. Co.* (W. Va.), 29 R. R. R. 230, 49 Am. & Eng. R. Cas., N. S., 230.

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ing the shipment, but the mere fixing of a through rate, and the collection thereof, will not justify the inference.

Carriers—Connecting Carriers—Bill of Lading—Construction.—Where a bill of lading showed the destination of property to be a certain city, this meant, in the absence of usage or custom to the contrary, the terminal of the carrier's line in that city.

Carriers—Connecting Carriers—Contracts—Evidence.—In an action against an initial carrier for injuries to live stock by the negligence of a connecting carrier, evidence held insufficient to show any contract, express or implied, or a partnership or traffic agreement, between the two carriers, which rendered them practically one, so as to make the initial carrier liable for injuries from the negligence of the connecting carrier.

Carriers—Bill of Lading—Construction—Evidence.—In an action for delay in delivery of a live stock shipment, evidence held insufficient to show any agreement by the carrier receiving them to deliver at the stockyards, a point beyond its own terminal.

Appeal from District Court, Woodbury County; David Mould, Judge.

Action to recover damages for defendant's delay in a shipment of live stock from Glen Ellen to the Sioux City Stockyards. Defendant denied all negligence, and in substance averred that, if there was any delay, it was on the part of a connecting carrier for whose negligence it was not responsible. The case was tried to a jury, and at the conclusion of the testimony the trial court directed a verdict for defendant, and plaintiff appeals. Affirmed.

W. G. Sears, for appellant.

Shull, Farnsworth & Sammis, for appellee.

DEEMER, C. J. Glen Ellen is a station on defendant's line of road something like eight miles from Sioux City. Defendant had no agent at that point, but received its orders for shipment therefrom either at Sioux City or some other station. Plaintiff was the owner of 104 head of fat cattle which he desired to have shipped to Sioux City, and through his commission men notified the defendant's agent that he wished to make the shipment on defendant's regular train leaving Glen Ellen at 7:30 a. m. on Monday morning, May 13th, for the early Sioux City market. The cattle were shipped pursuant to the order, and arrived at defendant's yards in Sioux City, and were placed on the transfer tracks to be taken to the stockyards, at 8:15 a. m. of the day of shipment. When placed on this track the engineer of the train leaving them there gave the usual whistles to notify the

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stockyards switching company, or the Sioux City Terminal Railway Company that the stock was ready to be taken to the stockyards. This transfer track was less than one-half mile from the stockyards, and it seems that the defendant, as well as all other companies entering Sioux City, had an agreement with the stockyards company to do the switching from the transfer track to the cattle chutes of the stockyards. The stock remained on the transfer track for some little time, when they were taken to the chutes by the Terminal or Stockyards Company, and unloaded about 11 o'clock a. m. The usual running time between Glen Ellen and the stockyards, according to some of the testimony, is from one hour to one hour and fifteen minutes. Plaintiff claims that by reason of the delay he lost the advantage of the early market, and that by reason of the delay the cattle shrunk more than they would have done had they been delivered promptly. No bill of lading was issued when the cattle were shipped, but after the receipt of the stock the company issued bills of lading to the commission house, the following being a copy of one so issued:

Chicago, Milwaukee & St. Paul Railway.
Live Stock Way-Bill.

W. B. No. 11

Forwarded in Car No. 10071. Initials C. M. & St. P.

Transferred into car

No.	Initials	at
No.	Initials	at

From Glen Ellen, Ia., to Sioux City, Ia., (S. C. & D. Div.)

Date, May 13, 1907.

This form of Way-Bill must in all cases be used in billing stock to Chicago, Milwaukee, Sioux Falls, Sioux City, Kansas City, Ottumwa, Cedar Rapids, Omaha, South Omaha, Council Bluffs, St. Paul, Minneapolis, Minnesota Transfer and La Crosse. A separate Way-Bill should be made for each car. Agents should be careful to see that the Stub (which should not be detached), is a correct copy of the Way-Bill. The total charges must always be entered in the proper place.

Consignor.	Consignee.	Number and Description of Stock.	
L. Carter	McClusky H. G.	Cattle	
Weight.	Rate.	Freight Charges.	
22,000	54	11.88	

Full Names of Consignors and Consignees must be given on Way-Bill.

Plaintiff paid the freight on the goods as he said from Glen Ellen to the chutes at the stockyards to the Stockyards Company, and through his agents secured the following receipt:

Sioux City, Iowa, Station,
May 13, 1907.

S. C. & D. Div.

McClusky, Hudson & G.

To Chicago, Milwaukee & St. Paul R'y Co. Dr. For Freight from
Glen Ellen.

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[Here follow three lines in fine print providing for payment of trackage, if there is a delay of more than 24 hours.]

Date of Waybill	No. of Waybill	No. of Car	Description of Articles	Weight	Rate	Our Charges	Back Charges	Total
May 13	11	10071	Cattle	22000	5.4	11 88		
13 12	1553	"	"	24200		13 07		
13 13	10773	"	"	23500		12 69		
13 14	8885	"	"	23700		12 80		
13 15	12787	"	"	22400		12 10		
13 16	89045	"	"	22000		11 88		
						72 42		

Consignor

L. Carter.

Received Payment.

W. W. Breckenridge, Agent.

The verdict was directed largely on the theory that there was no delay, and that if such were shown, defendant is not responsible therefor. It is also argued that plaintiff failed to prove any damages which may be recovered in this form of action. There is not a great deal of conflict in the testimony, but different inferences are sought to be drawn therefrom, and there is some dispute regarding the law. The Sioux City Stockyards Switching Company or the Sioux City Terminal Company is an independent company, owning its own tracks and doing the switching of cars for the different railways entering Sioux City from what were known as the transfer tracks to the chutes at the stockyards. This company charged a switching fee, but it was collected from the railway companies, or absorbed by them. When the cattle were delivered at the chutes the Stockyards Company collected the freight, if it had not been prepaid, from the commission men representing the shipper, and turned the amount over to the railway company over whose line the same originated, and, as we have said, the initial carrier paid the switching company for the switching. There is no showing of any delay on the part of the defendant in taking the cattle to the transfer tracks; and, although defendant's testimony shows that there was no delay on the part of the switching company, there was testimony on the part of the plaintiff from which a negligent delay might have been found. There was also testimony tending to show a shrinkage in the cattle due to the delay; and, as the weights upon arrival at the chutes were given, the amount of this shrinkage might have been ascertained. There is some conflict in the testimony at this point, but there was enough to take the case to the jury on this issue. That a better price could have been obtained for

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the cattle had they arrived earlier in the day might also have been found from the testimony.

The debatable, and in fact the only troublesome, question in the case is the liability, if any, of the defendant for the delay of the switching company. The general rules with reference to such cases are pretty well established. It is well settled that a common carrier is not liable for the negligence of a connecting carrier in the absence of contract, express or implied. The initial carrier is regarded simply as a forwarding agent, and is not, in the absence of contract, liable for the default of a subsequent carrier. *Beard v. Railroad*, 79 Iowa, 527, 44 N. W. 803; *Mulligan v. Railroad*, 36 Iowa, 181, 14 Am. Rep. 514; *Cobb v. Railroad*, 38 Iowa, 601. Some exceptions to the rule are recognized by the authorities, as for example, when there is a partnership arrangement, or such a traffic agreement as makes the two lines practically one. See *C., H. & D. R. R. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Peterson v. R. R. Co.*, 80 Iowa, 92, 45 N. W. 573. According to the rule announced by this court the acceptance of goods by a carrier marked to a point beyond the terminal of its line creates a *prima facie* liability to deliver at the point of destination. See *Mulligan Case*, *supra*; *Angle v. R. R. Co.*, 9 Iowa, 487; *Beard v. R. R. Co.*, *supra*. This is also the rule in England, although contrary to the great weight of authority in this country. In order to hold the defendant in this case responsible for the delay, it must be shown that there was such an arrangement between it and the switching company as made the two lines practically one, or that defendant accepted the goods for shipment, not to the terminus of its line, but the chutes at the stockyards. Even if the latter be shown, it must also appear that the contract did not limit liability to matters happening on defendant's own line. The writer would be glad to adopt the rule announced by the great weight of authority in this country, and to hold that from the mere receipt of goods marked to a destination beyond the initial carrier's line no presumption arises of a contract to deliver at the point of destination, and that in such cases the initial carrier has done its duty if it makes safe and timely delivery to the connecting carrier. That this is the general rule, see cases cited in 6 Cyc. pp. 479, 480. We have, however, treated the whole matter as one of presumption, and recognized the right of the initial carrier to limit its liability in such cases, either by contract or by usage. *Hartley v. R. R. Co.*, 115 Iowa, 613, 89 N. W. 88; *Mulligan v. Railroad*, *supra*; *Hewett v. Railroad*, 63 Iowa, 611, 19 N. W. 790. Again it is quite generally held that, if a carrier issues a bill of lading or shipping receipt for the transportation of goods to a destination beyond its own line, it binds itself to deliver at the point of destination, and is liable for the delays of a connecting carrier, unless there be some limitation of liability in

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the bill of lading or receipt. See cases cited in 6 Cyc. p. 481. Of course a contract for through transportation may be upheld from the circumstances surrounding the shipment; and, in the absence of express contract, this is generally a question of fact for a jury. *Phila. R. R. v. Ramsey*, 89 Pa. 474; *Page v. Railroad*, 7 S. D. 297, 64 N. W. 137; *Mich. R. R. v. Myrick*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325. But the mere fixing of a through rate will not justify the inference of a contract for a through shipment. *Hill v. Railroad*, 60 Iowa, 196, 14 N. W. 249; *Hill Co. v. Boston & L. R. Corp.*, 104 Mass. 122, 6 Am. Rep. 202; *St. Louis Co. v. R. R. Co.*, 104 U. S. 146, 26 L. Ed. 679. There is no claim that defendant did or neglected to do anything on its part with reference to the shipment which would make it liable. Its liability must be predicated upon what the switching company did, or neglected to do. With these rules in mind we can go to the testimony offered by plaintiff in support of its claim that defendant is liable for the negligence of the switching company.

We have set forth the only bills of lading issued by the defendant company, and these show that the destination of the property was Sioux City, Iowa. In the absence of usage or custom to the contrary this means, of course, the terminal of defendant's line in Sioux City. The receipt shows nothing to the contrary, although the parol testimony offered in connection therewith shows that this was for the entire charge for delivery to the chutes at the stockyards. But neither the fixing of a through rate, nor the collection thereof, indicates in itself a contract for a through shipment. Plaintiff said in his testimony that he shipped his cattle over defendant's line from Glen Ellen to Sioux City, but that the business was done through his commission men. He also stated that he paid the freight at the stockyards to the defendant, taking the receipt heretofore quoted. He said that the freight paid by him covered the transportation from Glen Ellen to the stockyards chutes. He further testified as follows: "I understood that the transfer company took the cattle, after their arrival at the railroad yards in Sioux City, and my knowledge from hearsay was that the stock was handled by a transfer company. Q. Did you know, also, from hearsay that the railroad company itself did not deliver directly to the stockyards? A. Yes, sir. In May, 1907, I was generally familiar with the situation at the Sioux City Stockyards with reference to switching and to switching facilities, but did not know as an absolute fact that the Sioux City Terminal Railway Company or the Sioux City Stockyards did this switching. At that time I did not know whether the defendant railroad company had a switching track to the stockyards or not. I knew they switched the cars to the yards, but did not know they were independent. I knew that another engineer and crew took charge of the switching, but did not

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know to whom it belonged. I knew from hearsay that the railway company did not deliver directly to the stockyards. I never heard any claim that the shipper paid the Terminal Company to do this shipping, but always heard that the party shipping the stock paid the freight charges to the different railroad companies, and the railroad company settled for the shipping. The defendant never made any claim for shipping charges against me. The tracks of the Terminal Company do not extend outside of Sioux City. The defendant never made any claim to me that they would deliver the stock on a side track."

Another witness for plaintiff testified as follow: "I have raised stock and shipped the same from Glen Ellen, Iowa, to Sioux City and the stockyards. In making such shipment we pay freight on eight miles, and we pay to the railroad company only. I have shipped over the Milwaukee road from Glen Ellen to Sioux City fat cattle on an average of three to four times a year."

The member of the commission firm, who made the arrangements for the shipment of the cattle, and who paid the freight, testified as follows: "I telephoned to the train dispatcher, or some other officer, and asked him to put the cars from Glen Ellen in for the Monday morning market. This was on the previous Friday or Saturday. Heretofore they had come down there with a switch engine and brought them up, but he said the regular train would pick them up that morning, if on time. There was nothing said about turning the cars over to the Terminal Company. May 13, 1907, was Monday. I paid the freight and got the receipt, marked 'Exhibit A,' from the Milwaukee Railway Company, and handed it to Mr. Carter. The freight charges on the cattle were \$74.42. The Milwaukee Company has offices in the Exchange Building at the stockyards, and the freight was paid in this office. There were no terminal or switching charges. * * * I did not understand that there was any arrangement to turn these cattle over to the Terminal Company, and I did not know that they would come into the yards from the transfer tracks by the Terminal Company. They were all switched in by the Stockyards Company. The Stockyards Company is an independent concern from the Milwaukee Railway Company, but I do not know what their connection is. At the time I ordered the cars I knew the Stockyards Company took the cars from the transfer track to the yards, but we always ordered cars from the railroad company. When we order cars from the railroad company, we know, with the knowledge of the custom in practice, that they are switched from the defendant company's line by the Stockyards Company. * * * In regard to the custom by the Terminal Company and the railway company, will say that we deal direct with the railway company. I do not know whether there is a terminal charge in Sioux City or not.

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In Chicago they are putting a terminal charge on their account sales. We have no transaction with anything except the railway company, from whom we order the cars. We pay the freight in the first instance to the Stockyards Company. The Stockyards Company turns it over to the Milwaukee Company. The Milwaukee Company has an agent and a freight office in the Exchange Building. We did not order the cars through any soliciting agent, but took it up with Mr Beardsley, the defendant's superintendent." Q. If there is a terminal railway company, that is the company that handles the stock? A. Yes, sir; but it is the Stockyards Company. Q. Is it operated by the Stockyards Company? A. Yes, sir. Q. An independent concern from the Milwaukee Railroad Company? A. Yes, sir. Q. You know stock coming in over the defendant railroad company's tracks is taken from their yards, by this transfer company? A. Yes, sir; Stockyards Company, I call it. Q. And that is what you had in mind when you ordered the cars? A. I did. Q. You knew, as a matter of custom for years, that the Stockyards Company, or some company, handled these cars from the defendant company? A. Yes, sir. Q. You knew that when you ordered these cars? A. Yes, sir. Q. You knew that was the custom? A. Yes, sir. Q. When you order cars from the defendant line, you do so with the knowledge of the custom and practice that these cars are switched from the defendant company's lines to the stockyards by the Stockyards Company? A. Yes, sir. Q. And that has been the custom for a number of years? A. Yes, sir. Q. All the time? A. Yes, sir. Q. And you paid the freight charges on this stock to the Stockyards Company? A. Yes, sir. The weights of these cattle were taken at the stockyards track scales, and that is the basis upon which the freight charges were made. They were taken to the Stockyards Company, and as the Stockyards Company brings them to the yards they take them over the scales and weigh them."

The defendant's testimony from various witnesses on this point was as follows:

Daniel Williams testified: "In May, 1907, I was assistant yard master for the Stockyards Company. The Sioux City Stockyards Company handled stock by loading and unloading the same. They operate a transfer company, but not a railroad company, and own all their own engines, and switch stock that comes in from different railroads, including the defendant's road. I think the transfer track is about half a mile from the chutes. * * * Our stockyards company is called the Sioux City Terminal Company, and is not connected with the defendant company. I have worked for the Stockyards Company for nine years, and the custom has been to leave cars loaded with stock for the stockyards at this transfer track. Q. What is the fact as to whether or not the Milwaukee Company, defendant, makes any delivery

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of stock to the stockyards proper? A. They don't, unless it would happen to be a case where an engine breaks down. Q. That would be by special arrangement? A. Yes, sir; it would. Q. Do you know what the fact is as to whether or not the Stockyards Company will allow any other company to do any switching business, unless it is under unusual circumstances? A. No, sir; they don't allow it. I don't know who pays for the switching. I do not work under the orders of the shippers. When we hear the whistle, we go up and get the cars."

The conductor of defendant's train, which took the stock, testified: "On our arrival at the stockyards we cut off our engine, and a switch engine is supposed to get them and set them over to the stockyards on a transfer track, which track is called track No. 12. This track is about a block from the stockyards transfer track. * * * The Milwaukee switch engine comes along and leaves the stock car on our track, called No. 12, and then the stockyards people come and get it and go down to the stockyards with it."

Defendant's engine foreman testified as follows: "We took the stock up from the defendant's track No. 12, which is an incoming track for trains from the east, and where stock is generally set over for transfer. We put our switch engine on these cars at 8:30 in the morning, and from No. 12 we put them on what is known as the stockyards lead. This took five or six minutes. * * * Then we gave the usual signal, three blasts of the whistle, the same as all railroads do, to notify the Stockyards Company that the stock is on the track. * * * When we whistle we stop right in front of the stockyards transfer office. This whistle is an agreement between the railroads and the Stockyards Company to let them know that the stock is on the transfer. * * * These cars were left on track No. 12, as we always leave stock cars."

The president and general manager of the Stockyards Company testified as follows: "I am familiar with the moving and custom of delivering stock to the yards by the various railroads that enter in Sioux City. The manner of handling stock at the stockyards is as follows: The stock arrives in the yard of the defendant company. The trains are broken up, caboose taken off, cars inspected to see if they are in proper condition, then the switch engine of the roads take hold of the train of stock, switch it to the tracks called transfer tracks, which are on First street, then they are left with another engine of the Stockyards Company to take the cars to the chutes of the Stockyards Company. In case of the Milwaukee Company stock is not switched over the transfer track, because the tracks are not large enough, so an arrangement has been in force for years so that the Milwaukee Company put the stock upon one of their own tracks right next to these First street tracks, and the stockyards engine comes

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into the Milwaukee yards after the stock. The so-called stockyards tracks or transfer tracks are joint tracks owned by five different railroads, and these joint tracks are leased to the stockyards, and the balance of the tracks are owned by the Stockyards Company. The operation and ownership is independent of the defendant, the Milwaukee Railroad Company. This practice has prevailed about 17 years and is certainly known by the commission men, and, I think, by McClusky, Hudson & Breenameyer in May, 1907. Now we have a terminal company independent of the Stockyards Company, but in May, 1907, we did not. The Stockyards Company at that time owned the tracks from the stockyards and packing house out to these joint tracks I speak of, and operate these joint tracks to a point on First street, where all delivery of stock was made to the Stockyards Company. Some years ago tracks were put in on First street for the accommodation of the stockyards and packing house, which were located somewhat different than now, and were bought by the different railroads in 1890. They were operated by these companies, and then they arranged with Stockyards Company to do the switching, and after that the loads to the yards and the packing houses went over these tracks, which are now owned by the Stockyards Company. The railroads owned the different tracks, which did the switching, but afterwards we built out to the tracks and extended them a little further, and then we made arrangements with these different companies to do the switching, and for a while we used their tracks entirely. Afterwards the stockyards built tracks connecting with these joint tracks, and in May, 1907, in switching from the Milwaukee transfer we would run over a little less than half a mile of their tracks, and would use part of these tracks to get on our tracks. We then had a switching charge to the different railroad companies. We have no switching charge against the shippers. In this Carter case we charged a switching charge to the defendant. Q. You charged to any railroad company that delivered stock to you? A. Yes, sir. Q. That is more an arrangement than a custom? A. Yes, sir; it is an agreement. Q. This agreement you think has been changed from time to time, I suppose, in some particulars? A. Agreement as regards switching? Q. Yes. A. Yes; we have changed it some. After the Carter cattle were unloaded we delivered the car back to the defendant's tracks. The Stockyards Company collects freight on their stock sold at the yards, and turns it over to the different companies. Each railroad company has their clerks at the different offices in the Exchange to figure the freight, and the Stockyards Company simply collects it from the commission men. I understood that in May, 1907, the lease of the joint tracks with the different railroads has run out, and we were operating under promise of another. The Stockyards Company allowed no other company to do any switch-

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ing to or from the yards. The Stockyards Company did all of the switching to all industries on its tracks."

This is the entire testimony in support of the proposition that under the rules hitherto stated defendant should be held liable for the delay of the Stockyards Company. In it we find no such showing of a traffic or partnership agreement between the Stockyards Company and the defendant as would make the defendant liable. The bill of lading issued by the defendant company fixed the destination of the property at Sioux City, and this, in the absence of proof to the contrary, meant the yards of the defendant company in Sioux City. Plaintiff said that he shipped the cattle to Sioux City, and that he paid the freight from Glen Ellen to the chutes at the stockyards. His agent who made the arrangements did not say that defendant agreed to deliver the stock at the chutes. He said he knew of the arrangements, and understood that the Stockyards or Terminal Company was to do the switching, and that it was the custom and usage of the switching or terminal company to take the cars at the transfer and take them to the chutes at the stockyards. He also said that he paid the freight to the Stockyards Company. It also appeared that the defendant company paid the switching charge, or absorbed it in its freight rate. There is nothing here then to show a partnership arrangement or such a joint undertaking as made each company liable for the default of the other under the rules above announced. Moreover, there is no showing of any undertaking, either express or implied, on the part of the defendant company to deliver the stock at the chutes. Plaintiff's agent knew the prevailing custom and usage, and knew that defendant did not undertake, on its own account, to make delivery at the stockyards. It is true that the Stockyards Company collected all the freight, and that the freight finally went to the defendant company, but this did not, in view of the testimony as to the usual and customary method of delivery, make the defendant liable. It merely undertook to and did pay the switching company its proportion of the charges. There is no testimony that the goods were either marked or billed to the stockyards, or that defendant undertook to carry them there. Its undertaking was to deliver to the switching company, and to pay the charge of that company. This did not make it liable for the default of that company. There was no testimony which would justify a finding against the defendant, and the trial court did not err in directing the verdict. None of the cases cited and relied upon by appellant run counter to the views herein expressed.

The judgment must be, and it is, affirmed.

BURROWES *v.* CHICAGO, B. & Q. R. Co. *et al.*

(Supreme Court of Nebraska, Dec. 14, 1909.)

[123 N. W. Rep. 1028.]

Appeal and Error—Record—Evidence—Bill of Exceptions.—Affidavits, or other evidence used in support of a motion objecting to the jurisdiction of the district court, cannot be considered on appeal to this court, unless made a part of the bill of exceptions. In such case the ruling of the district court retaining jurisdiction will not be disturbed.

Carriers—Loss of Goods—Delivery to Carrier—Acceptance.—To render a transportation company liable as a common carrier for the loss or destruction of goods, they must have been delivered to and accepted by it for transportation.

Carriers—Loss of Goods—Delivery to Carrier—Acceptance.*—The plaintiff, who was the proprietor of a tent show, loaded a part of his outfit on Sunday afternoon into a car furnished him by the railroad company, and retained the remainder for his use during the following night, under an agreement with the agent that the plaintiff would finish loading the car on the following Monday morning, when it was to be hauled to a station some 12 miles distant. The car containing the goods was destroyed by fire, without negligence on the part of the defendant company, before the time came for loading the remainder of plaintiff's outfit. Held, that defendant was not liable as a common carrier for the loss occasioned thereby.

(Syllabus by the Court.)

Appeal from District Court, Holt County; Westover, Judge.

Action by Boyd Burrowes against the Chicago, Burlington & Quincy Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

N. K. Griggs, for appellants.

M. F. Harrington, for appellee.

BARNES, J. Action in the district court of Holt county to recover damages for the destruction of property alleged to have been delivered to the defendant as a common carrier, to be transported and safely delivered at Ashton, Neb. Plaintiff had judgment, and the defendant has appealed.

Two questions are presented by the record, which may be briefly stated as follows: (1) The court erred in overruling the defendant's objection to the jurisdiction; (2) the judgment is not sustained by the evidence.

*See last foot-note of *Lord v. Maine Cent. R. Co.* (Me.), 33 R. R. R. 130, 56 Am. & Eng. R. Cas., N. S., 130; second head-note of *St. Louis, etc., Ry. Co. Burrow & Co.* (Ark.), 33 R. R. R. 754, 56 Am. & Eng. R. Cas., N. S., 754.

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Considering the first assignment, it appears that suit was originally brought against appellant and the Chicago, Burlington & Quincy Railroad Company and the Burlington & Missouri River Railroad in Nebraska jointly. All of the defendants, by special appearance, objected to the jurisdiction of the court, for want of proper service of summons upon them, and supported their objections by affidavits tending to impeach the officer's return upon the writs, and show that the service was not made upon either of the defendants in the manner provided by law. On the 23d day of March, 1908, the district court overruled these objections, to which the defendants duly excepted, and thereafter applied for, and were given, until the 30th day of that month to answer plaintiff's petition, and it was agreed between the parties that the cause should be set down for trial on the 1st day of April, 1908. Answers were filed, by which the defendants renewed their objection to the jurisdiction of the court, admitted their corporate existence, and denied all of the other allegations of plaintiff's petition. On the trial plaintiff dismissed his action as to the Chicago, Burlington & Quincy Railroad Company and the Burlington & Missouri River Railroad. The defendant offered no evidence to support its plea to the jurisdiction, and the affidavits used in support of its motion, objecting to the jurisdiction of the court, are not contained in the bill of exceptions. It is true that what purports to be copies of the affidavits are attached to the transcript; but, as above stated, not having been made a part of the bill of exceptions, they cannot be considered.

In *First National Bank of Madison v. Carson*, 48 Neb. 763, 67 N. W. 779, it was held: "The action of the district court in overruling a motion cannot be reviewed here, where evidence was necessary to support such motion, and such evidence was not preserved by the bill of exceptions." In *Morsch v. Besack*, 52 Neb. 502, 72 N. W. 953, we said: "Affidavits used on the hearing of a motion in the trial court, to be available on review, must be included in a bill of exceptions." *Carmichael v. McKay*, 81 Neb. 725, 116 N. W. 676, was a case where jurisdiction of the justice of the peace who rendered the judgment, from which an appeal was taken to the district court, was challenged in such a manner as to present a question of fact, and it was contended by the appellant that the record disclosed that the facts had been determined upon the affidavit of one Justice Burton. There was no bill of exceptions, but there was an affidavit in the transcript. It was said: "As no bill of exceptions was preserved, we are unable to say upon what evidence the district court acted in determining the question of fact. This court has repeatedly held that, where affidavits are used on the hearing of a motion, or in support of or against the issuance of a temporary injunction, if they are not preserved in a bill of exceptions, they will not be considered in this court." We are not aware of the ex-

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istence of any case where we have announced a contrary rule. It follows from the foregoing that the presumption in favor of the validity of the judgment of the district court, not having been overcome by anything contained in the record, its ruling on the question of jurisdiction should be affirmed.

We will now consider defendant's remaining contention that the judgment is not sustained by the evidence. It appears from the transcript that plaintiff's petition was framed with a view to charge the defendant with liability as a common carrier and also as a warehouseman or bailee; but, having failed to show negligence of any kind on the part of the defendant, plaintiff must recover if at all, on defendant's liability as a common carrier or an insurer of the safe delivery of his property. There seems to be little, if any, conflict in the evidence. The plaintiff testified, in substance, that just prior to the 12th day of May, 1907, he had been giving a tent show in the village of Loup City, Neb.; that he desired to move his show to the village of Ashton, some 12 miles distant on the line of the defendant's railroad, and to that end applied to defendant's agent for a car in which to ship his entire outfit to that point; that on Saturday before his loss occurred, he spoke to defendant's agent about loading on Sunday afternoon, and the agent said it would be all right. Plaintiff said: "I told him I wanted to load my freight and baggage, and I wanted to keep my cook tent and a couple or three sleeping tents out, putting them in Monday morning, and he advised me that it would be all right." It appears that a car was placed on defendant's side or passing track at the plaintiff's disposal, and he was notified of its position. It further appears that no trains were due to pass that station until the next Monday morning at 9:30 o'clock, that defendant's agent visited another village some distance away on Sunday, and that plaintiff had notice of those facts. On Sunday afternoon plaintiff and his employees took possession of the car, and placed therein his main tent, with its poles, stakes, ropes, etc., together with a gas machine which he used to manufacture gas, and thus supply light for his evening performances. When he had partly loaded his outfit, he or one of his men closed the car door. The remainder of his plant, which included his cook tent, his sleeping tents, and bedding, together with some personal baggage, his gasoline stove and cooking utensils, were kept out for use over night. These were to be loaded the following morning, and plaintiff was then to furnish a statement of weights and the contents to the agent, who would then seal the car and fix the charges for transportation. The car was then to go forward in the 9:30 passenger train, to which the defendant company was to attach it. On Monday morning, at about 5 o'clock, it was discovered that the car containing plaintiff's goods was on fire, apparently having become ignited from the inside. In spite of all

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efforts to extinguish the fire the car, together with its contents, was totally destroyed. No notice was given the defendant or its agent that plaintiff had commenced to load the car, and the agent had no actual knowledge of that fact until the car was discovered to be on fire. There is thus presented the question as to whether the defendant was liable to the plaintiff as a common carrier for the loss of his property.

The rule seems to be well settled that, in order to render a transportation company liable as a common carrier for the loss of goods, delivery of the goods must be made to the carrier, or his agent, for transportation; for, if the goods are delivered to him to be stored by him for a certain time, or until the happening of a certain event, or until something further is done to prepare them for transportation, or until further orders are received from the owner, the carrier becomes a mere depositary or bailee until the appointed time has expired, or the other contingency happened upon which the carriage is to commence, or until further orders have been given, as the case may be, for nothing could be more unjust than to permit the owner of the goods to impose upon a mere depositary or warehouseman, whether he has yet become related to the goods as carrier or not, the extremely hazardous responsibility of the common carrier, so long as it might suit his interest or convenience to do so. *Hutchinson on Carriers*, §§ 112-125.

In *Basnight v. Railroad Co.*, 111 N. C. 592, 16 S. E. 323, it was held that the mere loading of goods into a car standing on a side track does not constitute a delivery to the carrier, where the station agent, on being notified of the fact, declines to ship the goods. In *Railroad Company v. Montgomery*, 39 Ill. 335, it was held that the technical liability of a common carrier does not attach until the delivery to him of the property is complete. In that case A. delivered to the railroad company for transportation a quantity of hay, which was placed on platform cars. The next day, when the company was about to send it forward, A. requested that it should not be taken away until he could first see the party to whom it was sold, which request was complied with, and the next day the hay was ignited by sparks from a passing locomotive, and a portion of it burned. It was held that from the moment A. requested the hay to be detained the liability of the company was that of a warehouseman only. *Missouri Pacific R. Co. v. Riggs*, 10 Kan. App. 578, 62 Pac. 712, was an action instituted against the railroad company to recover the value of certain goods delivered by the agent of the plaintiff to the agent of the defendant at its station in the city of Osborne, to be carried to the city of Chicago, Ill., and there delivered to the plaintiff. The defendant denied that the goods were received by it as a common carrier, and alleged that they were received by it as a warehouseman only, and that the

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same was destroyed by the act of God, lightning having struck the warehouse or depot in which the goods were stored, and that they were destroyed by fire as the result thereof. There was a trial to the jury, a verdict in favor of the plaintiff, and judgment was rendered thereon; and it was held that, where goods are delivered to a carrier to be shipped, but not to be shipped until other goods are delivered the next morning to be shipped with them, its liability in the meantime is that of a warehouseman only. In *Missouri P. R. Co. v. McFadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944, it was said: "The liability of a carrier begins when the goods are delivered to him, or his proper servant authorized to receive them for carriage." *Redfield on Carriers*, § 80. "The duties and obligations of the common carrier with respect to goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or obligation between the carrier and the owner of the goods. It must rest entirely upon one or the other; and, until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them." *Hutchinson on Carriers*, § 82." It was further said: "Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that, when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill. Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where, not only is there a failure to deliver, but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper."

It seems clear in the case at bar that there was no delivery of the plaintiff's goods for immediate shipment; that while it is true the car was on defendant's side track, yet it was in the possession of the plaintiff. He had only loaded a part of the goods for shipment, and it had been agreed that the remainder of them should not be loaded until the following morning at a time subsequent to the destruction of the car by fire. No bill of lading had been issued by the company. No receipt for the goods had been given, and it still remained for the plaintiff to finish loading the car; to notify the defendant when he had done so; to furnish weights and contents, after which the rate for transportation was to be fixed by the agent before the car was sealed and ready to go forward to its place of destination.

We are not without authority of our own on this question. In *Chicago, B. & Q. R. Co. v. Powers*, 73 Neb. 816, 103 N. W. 678, it was held that a railroad company, which constructs its yards

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by the side of its track to facilitate the loading and unloading of stock, is not responsible as a common carrier for stock placed in such yards for subsequent shipment, but subject to the right of the shipper to remove the stock from the pens for feed and water before the shipment is actually made, is not liable as a common carrier, and its liability is no greater than that of an ordinary depositary or bailee. It was said in that case that the liability of a common carrier does not attach until the goods are unconditionally delivered by the shipper and accepted by the carrier. The foregoing rules are so well established that it is unnecessary to cite further authorities in support of them.

In a well written brief counsel for the plaintiff has cited certain authorities in support of his contention that defendant's liability is that of a common carrier. Those authorities will now receive our consideration. *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783, was a case where the express company was to receive certain goods at the depot, where they were delivered at the time agreed upon. It was held that the liability of the express company as a common carrier began when they were so delivered. In *Watson v. Memphis & Charleston R. R. Co.*, 56 Tenn. 255, the shipper applied to the agent of the defendant company the day before his cotton was hauled to the depot, who made an absolute agreement, in consideration of the freights to be paid, to receive the cotton when tendered, and to forward it as soon as he could. It was held that this was a complete contract, and the force of it could not be avoided by refusing to receive the cotton when tendered the next day. It was insisted on the part of the company that the agreement was that the company was to receive it when tendered, and forward it as soon thereafter as it was able. It was held that the question was one for the jury, and if the agreement was that the cotton was to be received when tendered the next day, and the company suffered plaintiff to leave it at its depot without objection, it was at its risk from that day; that the risk of the common carrier begins upon the delivery and acceptance of the goods. *Southwestern R. Co. v. Webb*, 48 Ala. 585, was a case where cotton was delivered or placed upon the platform at the defendant's station for shipment. There was a failure to deliver the cotton at the place of consignment. It was held that the company was not liable for the cotton stolen or lost after a deposit on the platform at a station house, unless it be shown that the railroad company or its agents had notice of the deposit, and received the cotton for transportation as a common carrier; and it was further held that whether there was a delivery or not to the common carrier for transportation was a question for the jury, where there was conflicting evidence on that point. In *Railway Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54, the goods were delivered for shipment, where it was the

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custom and usage of the common carrier to receive goods for transportation. It was held that there was a delivery in that case to the company for immediate transportation, and the fact that it gave no receipt for the merchandise did not affect its liability; delivery having been satisfactorily shown. In *Merriam v. R. R. Co.*, 20 Conn. 354, 52 Am. Dec. 344, which was an action to recover for the loss of goods, it was contended that the carrier was not liable without express notice of the deposit. It appeared that the goods were delivered in the usual manner for transportation by a common carrier, at his private dock in his exclusive use, for the purpose of receiving the property to be transported. It was held that such delivery was a good delivery to the carrier, and rendered him liable for the loss of the goods. *Shaw v. Northern P. R. Co.*, 40 Minn. 144, 41 N. W. 548, was a suit to recover for the loss of personal baggage of a passenger, delivered to the carrier, and received solely for transportation, and not for shortage. There was a recovery, and it was held that the consent of the carrier, for its own convenience, to some delay in the transportation could not be used as a matter of defense. It seems clear from the foregoing review of plaintiff's authorities that they are not applicable to the undisputed facts as shown by the record herein. We are of opinion that this case should be ruled by *Missouri P. R. Co. v. Riggs*, *supra*, and that the evidence does not sustain the judgment.

For the foregoing reason the judgment of the district court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

PITTSBURG, C., C. & ST. L. RY. CO. *v.* CITY OF CHICAGO.
(Supreme Court of Illinois, Oct. 26, 1909. Rehearing Denied Dec. 8, 1909.)

[89 N. E. Rep. 1022.]

Pleading—Declaration—Waiver of Defects.—Formal defects in the declaration were cured by the verdict for plaintiff.

Constitutional Law—Waiver of Constitutional Objections—Appeal to Appellate Court.—Defendant, by appealing to the Appellate Court, waived any objections to the constitutionality of the statute under which the action was brought.

Municipal Corporations—Torts—Injuries by Mobs—Persons Entitled to Sue—"Owner."—Act 1887 (Hurd's Rev. St. 1908, c. 38, §§ 256a-256g) is entitled "an act to indemnify property owners for damages caused by mobs and riots." Section 1 makes any city liable to an action in behalf of the party whose property is so destroyed or injured for three-fourths of the damages sustained. Section 3 prohibits recovery if the injury was caused or permitted by the negligence of the person, or unless he used all reasonable diligence to prevent such injury. Section 4 provides that the act shall not be construed to prevent any one whose property has been injured by any mob from maintaining an action against the wrongdoers. Section 5 gives a city against which judgment is recovered a right of action against the wrongdoer, and section 6 requires notice to the municipality by any person whose property has been injured. Municipal authorities are authorized by statute to suppress mobs and riots and to protect property. Held, that the word "owner" used in the title of the act did not restrict the right to the legal owner so that a railroad company which had in its possession cars of other roads received for transportation could recover against a municipality for their destruction by a mob within the city.

Carriers—Carriage of Goods—Actions—Persons Entitled to Sue.—Since a common carrier of goods is a bailee for hire, it may resort to any means to protect the property that the owner could use, and may recover the full value from one who destroys it, though the owner might also have an action against the wrongdoer.

Carriers—Carriage of Goods.*—A railroad company is bound to receive cars of other carriers for transportation over its line when requested, and occupies the same relation to such cars as to ordinary freight, and is liable to the owner of the cars in the same manner as to any other shipper.

Carriers—Carriage of Goods—Carrier's Liability.†—A common car-

*See extensive note, 1 R. R. R. 134, 24 Am. & Eng. R. Cas., N. S., 134.

†See last foot-note of Tiller & Smith *v.* Chicago, etc., R. Co. (Iowa), 33 R. R. R. 743, 56 Am. & Eng. R. Cas., N. S., 743; first foot-note of Lewis *v.* Louisville & N. R. Co. (Ky.), 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

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rier of goods is an insurer of their safety against all losses except those arising from the act of God or the public enemy.

Carriers—Carriage of Goods—Carrier's Liability—Destruction by "Public Enemy."†—The term "public enemy," under the rule that a carrier is liable for the loss of goods except by act of God or the public enemy, means enemy of the country, and does not include mobs.

Municipal Corporations—Torts—Injuries by Mobs—Notice of Claim—Sufficiency.—In an action against a city for the destruction of railroad cars by a mob, a notice of claim for damages signed by plaintiff's second vice president who had charge of its legal department, with a schedule attached, containing an itemized statement of the property destroyed, date when and place where destroyed, and the amount of damages claimed to have been sustained by the destruction of each item, was sufficient under the statute.

Appeal and Error—Findings Conclusive.—Where the evidence tended to establish a question of fact, judgment will not be reversed on appeal.

Evidence—Best Evidence—Secondary Evidence—Car Record.—Plaintiff's freight conductors made reports of the arrival of their trains at one of its termini, and made a duplicate thereof, except that it showed where the cars were placed after arrival and the information contained in these reports was transcribed by a clerk in a book called the "B. record," and subsequent reports showing further movement of the cars were entered in the same record. The record had been in use for a number of years, during which its accuracy was thoroughly tested. Held, that the record was admissible to show the arrival of a large number of plaintiff's cars at its yards during a period of several weeks over an objection that it was secondary evidence, and not a book of original entries; the clerk making the entries having testified that they were in his handwriting, and were correctly made.

Evidence—Best Evidence—What Constitutes.—In determining what is the best evidence the nature of the case admits of, regard must be had somewhat to the nature of the business to which the evidence relates and the methods of conducting it.

Trial—Jury Question—Weight of Evidence.—A record showing certain facts made up from original reports being competent under the circumstances, its weight and value were for the jury.

Appeal and Error—Harmless Error—Admission of Evidence—Facts That Are Shown.—Where a fact was shown by other competent evidence, the admission of evidence thereon was not prejudicial, even if incompetent.

Evidence—Best Evidence—Secondary Evidence—Admissibility.—In an action for destruction of freight cars, plaintiff offered in evidence to show the value of the cars when destroyed its record of car equip-

†See extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

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ment which showed the time and place the cars were built, the builder, the character of their construction, and repairs done thereafter. The record was made up from the reports of plaintiff's car inspector, showing the initials and number of the cars, after comparison with similar reports from the builder, the original reports being destroyed after they were used. Two of the persons who made the entries testified as to their correctness, and identified their own and the handwriting of their predecessors. Held, that the record was admissible for the purpose offered, when supplemented by the testimony as to the depreciation in value of the cars, and was not objectionable as secondary evidence; it being impracticable to preserve the innumerable reports from which the record was made or for one person to have personal knowledge of all the work done on a car.

Appeal from Appellate Court, Second District on Appeal from Circuit Court, Du Page County; A. H. Frost, Judge.

Action by the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company against the City of Chicago. From a judgment for plaintiff affirmed by the Appellate Court (144 Ill. App. 293), defendant appeals. Affirmed.

Edward J. Brundage Corp. Counsel (*Robert N. Holt*, of counsel), for appellant.

Loesch, Scofield & Loesch (*Charles J. Scofield*, and *E. C. Cooper*, of counsel), for appellee.

FARMER, C. J. This action was brought by appellee against the city of Chicago, appellant, under the act of 1887 to recover three-fourths of the damages alleged to have been sustained by appellee by the destruction of property by mobs in the city of Chicago during a strike of the employees of the Pullman Company and a sympathetic strike in their aid by the American Railway Union in July, 1894.

The declaration avers that plaintiff is a common carrier of freight and passengers over its line of railroad, which is partly located within the limits of the city of Chicago, and was on the 6th day of July, 1894, "possessed, as of its own property," of certain property described in the declaration, situate within the limits of the city of Chicago, on and near its line of railway in said city; that on said day, within the limits of said city, in consequence of a certain mob or mobs, riot, or riots, each then and there composed of 12 or more persons, within the limits of said city, a large quantity of the before described property was injured or destroyed, setting out a description of the property and its value. The declaration alleges that the property was not in transit at the time of its injury and destruction; that said injury and destruction were not occasioned or in any way aided, sanctioned, or permitted by any carelessness or wrongful act of plain-

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tiff or through any neglect of plaintiff to use reasonable diligence to prevent said injury and destruction; that within 30 days of the destruction of the property plaintiff gave notice to the defendant of said injury and destruction and demanded payment of three-fourths of the loss and damage sustained, but the defendant refused to pay the same, etc. There was no demurrer to the declaration, but defendant pleaded the general issue. A change of venue was taken from Cook county to Du Page county, where a trial by a jury was had, lasting substantially four months. A verdict was returned in favor of the appellee for \$100,000, upon which the court, after overruling motions in arrest and for a new trial, rendered judgment. From that judgment an appeal was prosecuted to the Appellate Court for the Second District. One of the judges of the circuit court of Du Page county was also one of the justices of the Appellate Court for the Second District, and as appellee had, before entering upon the trial in Du Page county, applied for a change of venue from all of the judges of the sixteenth circuit, of which Du Page county is a part, said justice of the Appellate Court deemed it his duty to refrain from taking part in the consideration of the appeal to that court. The appeal, therefore, was considered by two justices of the Appellate Court, and the opinion states they agreed that under the pleadings and the evidence no other verdict than one in favor of appellee could have been returned. On the questions of law involved in the case, except as to the sufficiency of the declaration, we have not the benefit of the judgment of the Appellate Court, for the opinion states that they were unable to agree upon the right of appellee to recover for the destruction of property belonging to others than appellee and upon the competency of certain evidence offered and admitted over the objection of appellant. The opinion states that one of the justices of the Appellate Court was of opinion that the verdict was warranted and should be sustained even if the rulings of the court complained of in the admission of evidence were held to be erroneous, that the errors complained of, if they were errors, did not require a reversal of the judgment; while the other justice of said court was of opinion that the rulings complained of were erroneous, and that the errors were of such a nature as to require reversal. The two justices of the said court being unable to agree as to whether the judgment of the circuit court should be reversed or affirmed, it was affirmed by operation of law, and the city has prosecuted an appeal to this court.

Appellant contends that the court erred in overruling its motion in arrest of judgment on account of the alleged insufficiency of the declaration. The objections made to the declaration are: First, that there is no sufficient allegation of ownership; second, that it does not locate the mob within the city of Chicago; third,

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that it does not sufficiently negative the proposition that the injury or destruction of the property was not sanctioned or permitted by the carelessness, neglect, or wrongful act of the plaintiff or through any neglect on its part to use reasonable diligence to prevent said injury and destruction; fourth, the declaration does not aver notice of plaintiff's claim for damages was presented to defendant within 30 days after the destruction of the property, as required by statute; fifth, that the declaration fails to state a cause of action, because the statute upon which the action is based is unconstitutional.

We do not regard the objections made to the declaration as of so substantial a character as to require their discussion in detail. If there were any defects, they were defects of form only, and were cured by verdict. As to the constitutionality of the law under which the action is brought, appellant waived that question by prosecuting its appeal to the Appellate Court. *Barnes v. Drainage Com'rs*, 221 Ill. 627, 77 N. E. 1124; *Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37.

The most important question involved in the case, and the one to which counsel on both sides direct the greater portion of their briefs and arguments, is the right of appellee to recover for the destruction of cars in its possession as bailee or lessee, but which, in fact, belonged to other railroad companies. The proof showed a large number of the cars destroyed or injured were owned by other corporations, but at the time of their destruction or injury were in possession of appellee in the usual course of its business as a common carrier. Appellant objected to the proof of damage on account of the destruction of such cars, but the objection was overruled and the proof admitted. The contention is that the statute was intended to authorize a recovery only by the absolute owners of the property, and, that appellee not being such absolute owner, it was not entitled to recover. The title of the act of 1887 (*Hurd's Rev. St.* 1908, c. 38, §§ 256a-256g), under which this suit is brought, is: "An act to indemnify the owners of property for damages occasioned by mobs and riots." The first section provides that in case of the destruction or injury of real or personal property, except property in transit, in consequence of any mob or riot composed of twelve or more persons, the city, if such injury or destruction occurs within a city, "shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof." The second section provides that the action may be brought in case. The third section provides that no recovery can be had in such action if the injury or destruction of property was occasioned, aided, sanctioned, or permitted by the carelessness, neglect, or wrongful act of the person or corporation, nor unless the person or corporation shall have used all reasonable diligence to prevent such damages. The

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fourth section provides that the act shall not be construed to prevent "any person or corporation whose property has been injured or destroyed in consequence of any mob or riot" from maintaining an action against the person or persons participating in such mob or riot. The fifth section gives the city against which judgment has been recovered a right of action against any person or persons engaged in the mob or riot. The sixth section provides for notice to the municipality, "by any person or corporation whose property shall have been destroyed or injured as aforesaid," within 30 days after the loss or damage occurs, and requires suit to be brought within 12 months after the destruction of or injury to the property. It will be seen that the title of the act is an act to indemnify "the owners of property." By the first section the municipality is made liable to an action "by or in behalf of the party whose property" was destroyed or injured. By the fourth section the right of action of "any person or corporation whose property" has been injured against any person or persons participating in the mob or riot for damages thereby sustained is preserved. The sixth section requires the notice to be given "by any person or corporation whose property shall have been destroyed or injured." Appellant contends that these words and phrases, both in the title and in the body of the act, clearly indicate that it was the intention of the Legislature that the action can only be maintained by the absolute owner of the property as distinguished from a person having a special property, such as a common carrier as bailee. A common carrier is a bailee of property for hire, and has such an interest in the property that he may resort to any means for its protection to which the absolute owner could have recourse, and may recover the full value of the property from a wrongdoer who destroys it. "He is, in short, for all practical purposes, the owner of the property for the redress of all wrongs or injuries to it whilst in his possession." 2 Hutchinson on Carriers, § 779. And this is true, although the real owner might also have an action against the same wrongdoer for the value of the property destroyed. *Id.* § 780.

It is not denied by appellant that this is the rule at common law, but it is contended that this rule has no application to actions brought under the statute, for the reason, as stated, that the statute gives the right of action to the absolute owner only, and not to a bailee or one who has a special ownership of the property. We do not construe the act of 1887 to do anything more than create a liability where none had previously existed. It did not take away from a person or corporation having a right of action against a wrongdoer for the value of the property injured or destroyed that right, nor in any way affect the remedy in such action. It provided for the liability of a party not liable at common law nor under any statute theretofore existing.

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The principle upon which such statutes rest is that it is the duty of the municipality to preserve peace and good order and protect private property; that, having the power to perform this duty, a failure or neglect to do so, resulting in the destruction of property by mobs or riots within its borders, makes the municipality a wrongdoer. *City of Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. Rep. 321.

We do not think the word "owner," as used in the title of the act, or the phrase, party or corporation "whose property" has been destroyed, was intended to be used in the restricted sense contended for by appellant. The purpose of the act, as stated in its title, is to "indemnify" owners of property, and the first section makes the city liable to an action "by or in behalf of the party" whose property is destroyed or injured. Appellee is a common carrier for hire, and as such is bound, when requested, to receive for transportation over its lines cars of other common carriers, and as to such cars it holds the same relation as to ordinary freight received by it for transportation, and is held to the same measure and character of liability to the owner of the cars as would attach with respect to any other property received by it for carriage. *Peoria & Pekin Union Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*, 109 Ill. 135, 50 Am. Rep. 605; *East St. Louis Connecting Railway Co. v. Wabash, St. Louis & Pacific Railway Co.*, 123 Ill. 594, 15 N. E. 45; *Peoria & Pekin Union Railway Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; *Schumacher v. Chicago & Northwestern Railway Co.*, 207 Ill. 199, 69 N. E. 825. The liability in such cases is that of an insurer of the safety of the goods against all losses except such as arise from the act of God or the public enemy. *St. Louis, Alton & Terre Haute Railroad Co. v. Montgomery*, 39 Ill. 335; *Chicago & Alton Railroad Co. v. Shea*, 66 Ill. 471; *Chicago & Northwestern Railroad Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *Adams Express Co. v. Wilson*, 81 Ill. 339; *Merchants' Despatch Transportation Co. v. Kahn*, 76 Ill. 520; 1 Hutchinson on Carriers, § 42; 4 Elliott on Railroads, § 1454. The "public enemy" means enemy of the country and not the carrier, and does not embrace mobs and riots. 1 Hutchinson on Carriers, §§ 315, 316; 4 Elliott on Railroads, § 1458.

The statute under consideration expressly preserves the right of action to the property owner against the persons composing the mob or riot, and as against such persons we think it clear the action could be maintained by a common carrier in possession as baillee. It is well known, and the Legislature must have had in mind, that mobs and riots are usually composed of persons of no financial responsibility, so that an action against them would be unavailing to recover the value of the property de-

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stroyed. With this in view, and in view of the fact that the law confers upon municipal authorities power to suppress mobs and riots and to protect property, the act of 1887 made the municipality liable to the same person or corporation in whom the right of action existed against persons composing the mob or riot, for three-fourths of the value of the property destroyed by mobs or riots within its borders which it failed to suppress and control. Any other construction of the act would in most, if not all, instances of cases like the one under consideration result in affording no adequate remedy to the person who suffers the loss. The liability of a common carrier in possession of cars as bailee is absolute in such cases as the one at bar, and the measure of the liability is the full value of the cars destroyed. In such case ordinary prudence and business judgment would lead the owner of the property to pursue its remedy against the bailee for full value rather than to resort to two actions—one against the city for three-fourths of the value and another against the bailee for one-fourth. It would follow, therefore, the bailee must in any event suffer a loss to the extent of one-fourth of the value of the property destroyed, and, in the event of the bailor refusing to pursue its remedy against the city, the bailee must suffer the entire loss if it cannot maintain this action. Such construction does not enlarge the liability of the municipality, for, whether the damages are recovered by and paid to the bailee or the bailor, the liability is the same, and a judgment in favor of the bailee would be a bar to a suit by the bailor. This construction gives effect to the purpose and intention of the act, which was indemnity to the person injured, whether that injury resulted to such person by reason of his being the absolute or special owner of the property destroyed. The statute authorizes the action "by or in behalf of the party whose property" was destroyed. While this action is in the name of the bailee, it is none the less brought "in behalf of the owner." "But, even when the real owner might sue, the action may still be brought in the name of the carrier, though the object of the suit may be a recovery for the full value of the goods, and a recovery by him will be a bar to any subsequent action by such general owner. But, in case the carrier should recover the full value, he will be entitled to the recovery only to the extent of his qualified interest in the goods, and as to the balance he will be held to be a trustee for the general owner, unless he has satisfied such owner for his loss." 2 Hutchinson on Carriers, § 780.

The precise question here involved was before the Circuit Court of Appeals for the Seventh Circuit in *City of Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509. The action in that case was brought against the city by the Pennsylvania Company under the act of 1887, and a recovery was had for cars destroyed which were in the possession of the plaintiff as

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bailee, but were owned by other carriers. Upon this question that court said: "The company was the owner in a sense though not having the general title, and it is clear that the recovery cannot be limited to the property to which the company had the full title. Possession with a special interest as bailee is enough. It was not necessary that all persons having an interest in the property should be made plaintiffs. It could not have been contemplated that under the statute all persons having any interest in the property should be required to come to Chicago and bring separate actions or join in one action for the recovery of damages. The statute did not change the general rule at common law that a common carrier may sue in his own name and recover for the value of the property which has been injured or destroyed by another while in his possession, and that bailees of property may sue in their own name and recover for wrongful injury to property in their possession." In our opinion there was no error in allowing a recovery for cars destroyed which were in the possession of appellee belonging to other carriers.

Appellant also contends that the notice given it by appellee within 30 days after the injury complained of, and the demand for payment of the damages sustained, are insufficient, and should not have been admitted in evidence. The notice is signed in the name of appellee by its second vice president, who the evidence shows had charge of the legal department of the corporation. A schedule attached to the notice contains an itemized statement of the property destroyed, the date when and the place where destroyed, and the amount of damages claimed to have been sustained by the destruction of each item of property. One of the objections to the sufficiency of the notice is that appellee was not the owner of a portion of the property, and it is claimed the notice could only be given by or on behalf of the real owner. What we have said elsewhere disposes of this objection. Other objections of a highly technical character are urged, but we think the notice was sufficient under the statute.

It is also insisted by appellant that the court erred in permitting evidence to go to the jury as to the destruction of property in the possession of appellee as bailee or common carrier, which was in transit. All that need be said on this subject is that the evidence tends to show that the cars destroyed were not in transit. The destruction occurred in the yards of appellee known as "Brighton Park yards" and Fifty-Ninth street yards, and these yards were used for the storage of empty cars and dead freight. The same question was raised by the city of Chicago in the Pennsylvania Company Case, *supra*, and upon that question the Circuit Court of Appeals said: "Then it is objected that some of the cars were in transit and for which

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no recovery could be had under the statute. But the evidence shows that the cars were not in transit, but were stored in plaintiff's yards until wanted for actual use." Whether the cars destroyed were in transit was a question of fact for the jury, and, the evidence tending to sustain appellee's contention that they were not in transit, we cannot reverse the judgment on the ground that it is contrary to the weight of the evidence.

The testimony of about 50 freight conductors, and reports made by them showing the arrival of cars in the city of Chicago during a period of a few weeks preceding the destruction of the cars sued for, were admitted. This was followed by the introduction of books called the "Borner record." These books purported to show what cars came into Chicago, into what yards they were placed, and any further movement made of the cars. In order that appellee might keep a record of the movement of cars on its line, conductors were required to, and testified they did, make reports on arrival of their trains in Chicago upon blank forms furnished them for that purpose, known as "P. L. 508." These reports were forwarded to appellee's offices at Pittsburg, where they were entered in records kept for that purpose by a force of clerks. The original reports, "P. L. 508," were identified by the conductors who made them and admitted in evidence. Another report was made by conductors on their arrival in Chicago. This report was on a form called "P. L. 66," and was transmitted to appellee's offices in the city of Chicago. It was a duplicate of the report on form "P. L. 508," with the addition that it contained memoranda showing where the cars were placed or stored after arriving in the city. The information contained in these reports was transcribed into the Borner record by a clerk whose duty it was to make up and keep the said record, and thereafter yard reports made to the same office showed any further movement of the cars and whether they had been taken out of the yards, and the information contained in these yard reports was also entered in the Borner record. The Borner record derived its name from the fact that a man by the name of Borner invented that form and system of keeping the record of cars. The clerk who kept the record testified the system had been in use for 30 years. After the reports from which the Borner record is made are transcribed in the record, said reports are sent to appellee's offices at Pittsburg, and, after a lapse of time, are destroyed. The original reports from which the Borner record was made could not be produced at the trial, and the record was objected to as not being a book of original entries and as being secondary evidence; also, because it was merely the conclusions of the clerk who kept the record, drawn from the reports from which it was made. With the exception of the record of two cars, the witness testified that the records admitted

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and read in evidence were in his handwriting; that the entries were correctly made in the record by him from the reports. The conductors testified that they made out their reports on form "P. L. 508" upon arrival of their trains in the city of Chicago and that said reports were correct; that they made out a duplicate of said report on form "P. L. 66," with the additions above noted. If "P. L. 508" was correct, as testified to, and "P. L. 66" was a duplicate of it, then "P. L. 66" must have been correct also.

In determining what is the best evidence the nature of the case will admit of, and what is secondary evidence, regard must be had, to some extent, of the nature and character of the business to which the evidence relates and the method of its conduct. In a case like the one under consideration, it would seem impracticable that the record of the movement of the vast number of cars appellee was required to deal with could have been a book of original entries. It is easily seen that the correctness of such a record is of the utmost importance to the common carrier for which it is kept. It was made in due course of business and according to methods whose accuracy had been tested for many years, and there can be no doubt from the preliminary proof that it was as reliable as if it had been a book of original entries or the reports from which it was made had been produced. In *Louisville & Nashville Railroad Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 28 Ky. Law Rep. 1146, 3 L. R. A. (N. S.) 1190, what is known as a "train sheet" was held competent evidence for the purpose of showing the arrival and departure of every train on the company's road at telegraphic stations thereon on a certain day. The train sheet was made by the train dispatcher, whose office was at the end of a division of the road, from information received by telegraph from the different stations on the line as to the movement of trains. It was held that the record so made in the due course of business was as reliable as information given by salesmen, draymen, porters, or wharfingers to a bookkeeper who makes original entries thereof in books. In *Meyer v. Brown*, 130 Mich. 449, 90 N. W. 285, the books of a railroad company were offered in evidence to show the weight of wood shipped, which was a material question involved in the case. The weights were first entered on cards and from these cards they were transferred to the books, and after comparing the cards with the entries in the books, to ascertain the correctness of the books, the cards were destroyed. The books were held competent. *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N. E. 796, and *Chicago & Northwestern Railway Co. v. Ingersoll*, 65 Ill. 399, tend to support the competency of the books in this case.

We are inclined to the view the court did not err in admit-

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ting the Borner record in evidence. Its value and weight as testimony were questions for determination by the jury. Other evidence, which was clearly competent, showed that about 700 cars were destroyed in appellee's Fifty-Ninth street and Brighton Park yards, so the appellant could not, in any event, have been seriously prejudiced by the admission of the record.

The same objections made to the Borner record were also made to the introduction in evidence, on behalf of appellee, of a record or book known as the "Historical record." This was the book in which the railroad company kept a record of its car equipment. It showed the time when, the place where and by whom the cars belonging to the company were built, the character of their construction, and to what extent the cars had been repaired or rebuilt. It was testified to by the clerk who kept this record that it was a record of everything in regard to the history of the equipment, both freight and passenger. The witness testified that, when a car is built, inspected, and turned out, the inspector sends a statement to the clerk or bookkeeper showing the initials and numbers of the cars. The carworks also sends a similar statement. These statements are compared, and if they agree they are entered in the record of equipment, which is the historical record. The memoranda or statements are kept for several years, and then destroyed. The technical name of the record is known in the business of the company as the "Record of car equipment." The witness testified that he had been engaged in the employment of keeping this record since 1900, and it was in his handwriting since that time; that the record had been kept since 1876, and the entries in it were continuous, regular and uninterrupted; that W. W. Bowman had kept the record before him; that L. S. Van Dyke, who was then dead, was Bowman's predecessor, and the witness identified Van Dyke's handwriting, and that Richard Bratton kept the book before Van Dyke. Bowman was called as a witness, and testified to the correctness of the book while he kept it. Historical records of other railroad companies, similar to that of appellee above described, were also identified and admitted in evidence, over the objection of appellant, for the purpose of showing the history and condition of the cars of these companies which were in the possession of appellee at the time of their destruction by the fire in appellee's yards. In the nature of things it would be well-nigh impossible to preserve and produce the original reports from which these records are made up, and it would be impracticable, if they were preserved, to use them as evidence on a trial, as it is apparent that their number must be legion, for a record is made not only of the construction, but of the condition and all repairs made on each car. Moreover, the original evidence of construction and repairs to cars is not within the personal knowledge of any

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one person. The work done on one car may be done by a number of men and under different foremen, so that an entry by the person having personal knowledge would seem impracticable. These books were offered as aids in arriving at the value of the cars at the time of their destruction. They purported to show the age of the car, its character, and the nature and amount of repairs made thereto. They were supplemented by the testimony of competent witnesses as to the depreciation in value of cars from age and use. None of this evidence was conclusive, but it was competent to be considered by the jury, together with the other evidence.

We may again here remark that the proof shows about 700 cars were destroyed by fire set to them by mobs. It was an impossibility to show with exactness just what usage each car had had since its construction or its precise condition and state of preservation, but the proof does show that they were capable of being moved on their trucks, and the minimum value placed upon them by appellee's witnesses would have produced a considerably larger sum than the verdict of the jury, to say nothing of other property destroyed, not including freight in cars, such as track, ties, tower buildings, machinery, oilhouses, watch-houses, toolhouses, and tools.

Some other questions have been raised by appellant as to the competency of testimony admitted. It would extend this opinion unnecessarily to discuss them in detail. We have examined the questions raised, and are satisfied no reversible error was committed respecting them.

We have examined the criticisms made by appellant of the rulings of the court in giving and refusing instructions, and are satisfied that no error was committed in that regard of such prejudicial character to appellant as would justify a reversal of this judgment.

The judgment of the Appellate Court is therefore affirmed.
Judgment affirmed.

KNIGHT v. SOUTHERN R. Co.

(Supreme Court of South Carolina, Feb. 24, 1910.)

[67 S. E. Rep. 16.]

Carriers—Carriage of Goods—Termination of Relation—Subsequent Liability.*—The liability of a railroad company as carrier ceases when the goods are ready for delivery at destination, and the consignee has had a reasonable time within which to remove them, after which the company's liability as warehouseman begins, rendering it liable only for loss resulting from negligence.

Carriers—Carriage of Goods—Termination of Relation—Arrival at Destination—Reasonable Time for Removal—Question of Fact or Law.†—Ordinarily what is a reasonable time within which a consignee must remove goods ready for delivery by the carrier before the carrier's liability as a warehouseman only begins is a question for the jury; but, when the facts are undisputed and are susceptible of but one inference, it is a question of law for the court.

Carriers—Termination of Relation—Reasonable Time for Removal of Goods.†—Where the only reason why goods ready for delivery by a carrier were not removed before destroyed by fire was because the consignee wished to have the bill of lading when he paid the freight, and had not received it from the consignor although he had written for it several times, a reasonable time for removal had elapsed where the goods had remained in the depot some weeks after arrival, and the consignee, about a week before the fire, had knowledge of their arrival, and the carrier's only liability was that of a warehouseman.

Carriers—Custom to Extend Liability as Carrier—Evidence.—Evidence held not to show a custom extending a railroad's liability as common carrier for goods ready for delivery at destination.

Carriers—Termination of Relation—Necessity for Notice to Consignee.*—A carrier need not give notice that goods must be removed within a particular time, nor that a charge will be made for storage unless they are promptly removed, before its liability as insurer will cease.

Appeal from Common Pleas Circuit Court of Bamberg County; R. C. Watts, Judge.

*See third head-note of *Lewis v. Louisville & N. R. Co.* (Ky.), 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

For the authorities in this series on the subject of the duties and liabilities of carriers as warehousemen, see second foot-note of *Lewis v. Louisville & N. R. Co.* (Ky.), 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

†For the authorities in this series on the question, what is reasonable time within which to remove freight after its arrival at destination, see last foot-note of *Lewis v. Louisville & N. R. Co.* (Ky.), 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

Knight v. Southern R. Co

Action by A. W. Knight against the Southern Railroad Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Wyman & Henderson, for appellant.

J. F. Carter, for respondent.

JONES, C. J. The plaintiff sued to recover of defendant as a common carrier for loss of goods destroyed by fire while in the depot at Bamberg, S. C., and for the statutory penalty for failure to adjust the loss within the time required by law. Upon the trial Judge Watts granted nonsuit upon the ground that the defendant was not liable as common carrier upon the evidence, under the authority of *Murphy v. Southern Railway*, 77 S. C. 76, 57 S. E. 664.

The first exception raises the question that the court erred in not submitting to the jury to determine whether a reasonable time had elapsed for removal by the consignee after arrival of the goods and before their destruction by fire. The evidence was that the goods remained in the depot "some weeks" after arrival, and that plaintiff "about a week or such a matter" before the fire had knowledge of their arrival. The general rule is thus declared in *Murphy v. Railway*, 77 S. C. 78, 57 S. E. 665: "The authorities in this state establish that the liability of a railroad company as carrier ceases when the goods are ready for delivery at the place of destination and the consignee has a reasonable time within which to remove the goods, after which the company's liability as warehouseman begins, and that as warehouseman it is liable only for loss resulting from negligence." *Spears & Colton v. Railway*, 11 S. C. 158; *Brunson v. Railway*, 76 S. C. 13, 56 S. E. 538, 9 L. R. A. (N. S.) 577; *Fleishman-Morris Co. v. Railway*, 76 S. C. 237, 56 S. E. 974, 9 L. R. A. (N. S.) 519. In *Murphy's Case* the goods were destroyed by fire seven days after the arrival. Plaintiff had notice of arrival and failed to remove. The court held in effect that a reasonable time for removal had elapsed, and there was no liability as common carrier. Ordinarily, it is for the jury to determine what is a reasonable time; but when the facts are undisputed, and are susceptible of but one inference, as in this case, the court may determine as matter of law what is a reasonable time within which the consignee should remove goods ready for delivery by the carrier. Much less than seven days has been held reasonable time. *United Fruit Co. v. N. Y. & B. Transportation Co.*, 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240; 10 Am. & Eng. Ann. Cas. 437; *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393. In this case there was no evidence that any act of the carrier or any vis major prevented removal; on the contrary, it appears that the only reason that the goods were not removed was that plaintiff wished to have the bill of lading when

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he paid the freight, and that he had not received such bill of lading from the consignor, although he had several times written for the same. We find no error in the ruling of the court in this regard.

The remaining exception charges error in granting the nonsuit because there was evidence tending to show a custom between plaintiff and defendant whereby the liability of the defendant as common carrier and insurer was extended. All the testimony on this point is contained in the following extract: "Q. In regard to the business transaction between yourself and the Southern Railway Company, did you have any special custom or usage with them as to the time when you remove your goods from the depot? A. They did not require any special time for the removal of them. Q. Now, had they allowed you to leave goods there from time to time—how many years previous to the loss of those goods had you been leaving your goods at the depot, as shipments came in there? Mr. Carter: May it please the court, is that competent? The Court: Not for years before. A. I had been leaving them there for two or three weeks. Q. How many times had they allowed you to leave your goods in the depot? A. I don't remember; but it must have been several times. Q. Did you not consider that these goods were in the hands of the railway company as a common carrier? A. I most certainly did. Mr. Carter: May it please the court, I think this is incompetent. The Court: Let him state the facts, Mr. Wyman. Q. Previous to the time you lost these goods, was it ever required of you on the part of the railroad company's agent to pay storage charges? A. No, sir. Q. You never had to pay storage charges? A. No, sir." We do not think there is anything in the above tending to show the existence of a custom extending the defendant's liability as a common carrier and insurer, although it may tend to show that defendant on several occasions before had held plaintiff's goods as warehouseman without charge. It is not incumbent on the carrier to give notice that goods must be removed in a particular time, or to give notice that a charge will be made for storage unless the goods are promptly removed before its liability as insurer can cease. This conclusion is not in conflict with the decision in *McCoy v. Atlantic Coast Line Railway Co.*, 84 S. C. 62, 65 S. E. 939. In that case the baggage which arrived at Sumter, the terminal station, on Thursday night, February 21st, was destroyed by fire on Sunday, February 24th, and there was evidence tending to show that plaintiff therein was a traveling salesman going in and out of Sumter as his headquarters, and that it was the custom for the railroad company to hold the trunk at the depot for retransportation as baggage. Under these circumstances, the court held a charge not erroneous which submitted to the jury to determine whether there was such a custom, and

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what effect should be given to it in determining whether the railroad company was liable as common carrier or as warehouseman. Neither the issues as made on the trial under the pleadings nor the exceptions require us to consider whether the liability of defendant as warehouseman should have been submitted to the jury.

The judgment of the circuit court is affirmed.

McMILLAN v. CHICAGO, R. I. & P. RY. CO. *et al.*

(Supreme Court of Iowa, Feb. 18, 1910.)

[124 N. W. Rep. 1069.]

Carriers—Limitation of Liability—Requirement of Caretaker—Negligent Delay in Transportation.—The rule that, where live stock is accompanied by a caretaker as required by the contract of transportation, the carrier is not liable for failure to feed or water the stock during the transportation, unless it fails to furnish to the caretaker proper facilities therefor, does not relieve it from liability for negligent delay in transporting the stock which the caretaker may not prevent in the exercise of diligence.

Carriers—Connecting Carriers—Agent.—The agents of a transfer company, taking a car from the initial carrier at its terminal point and switching it to the track of a connecting carrier, are agents of the connecting carrier in the sense that it is only through them that it can be advised that the car is ready for transportation by it.

Carriers—Delay in Transportation—Negligence.—Evidence held to show unreasonable delay in the transportation of live stock by the connecting carrier.

Carriers—Delay in Transportation—Burden of Proof.*—A carrier delaying the transportation of property has the burden of showing a special excuse, such as unusual rush of business at the time.

Carriers—Connecting Carrier—Duty to Transport.—A connecting carrier must accept and transport cars delivered to it for transportation without waiting for the making of a new contract, especially where it did not advise the agent of the shipper that it would not transport the car until a new contract was made.

Carriers—Delivery to Connecting Carrier.—A car is delivered to the connecting carrier when it is placed on its transfer track, and it is notified of that fact.

Appeal from District Court, Lyon County; David Mould, Judge.

*See foot-note of *Tiller & Smith v. Chicago, etc., Ry. Co. (Iowa)*, 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581; extensive note, 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S., 298.

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Action to recover damages for negligence in the transportation of a horse, the property of plaintiff, resulting in the death of the animal. At the conclusion of the evidence offered for plaintiff, there was a directed verdict in favor of defendants, and from judgment thereon plaintiff appeals. Reversed.

J. M. Parsons, for appellant.

J. L. Kennedy, R. C. Roach, Carroll Wright, and J. L. Parrish, for appellees.

MCCLAINE, J. The plaintiff shipped a car load of draft horses from Des Moines, where they had been exhibited at the State Fair, to Hamline, where they were to be exhibited at the Minnesota State Fair, a written contract being entered into with the Rock Island Company for transportation over its line to Minneapolis and delivery of the car there to the proper connecting carrier; the liability of the Rock Island Company being limited to its own line. The evidence tends to show that the car left Des Moines on Friday evening, September 1st, and reached Minneapolis about 1:30 on Sunday morning following, and that without delay it was taken from the Rock Island Company by the Minnesota Transfer Company for the purpose of being switched to the connecting track of the latter company with the defendant the Great Northern Railway Company, by which it was to be transferred to the proper place for unloading at the state fair grounds at Hamline, a suburb of St. Paul; that the proper agent of the Great Northern Company was notified by the agent of the transfer company about 6 o'clock Sunday morning that 35 cars, including the car containing plaintiff's horses, were ready to be taken by the Great Northern Company from the transfer track to the fair grounds; that during the forenoon of that day some of the cars destined for the fair grounds were taken by the Great Northern Company, but that the car containing plaintiff's horses was not removed from the transfer track until the afternoon, and did not reach the place for unloading at the fair grounds until about 3:30 that afternoon; and that by reason of the delay in taking the car from the transfer track to the fair grounds, plaintiff's horses became chilled, and one of them as a result was taken sick and died. The action was for damages accruing to plaintiff by reason of the death of this animal. A verdict directed for the defendant the Rock Island Company at the conclusion of the evidence was justified on the ground that there was no evidence tending to show negligence in delivering the car containing plaintiff's horses to the transfer company, which was the connecting carrier, and we find nothing in the argument for appellant requiring a review of this ruling. The argument is directed entirely to the liability of the Great Northern Company.

The contract under which the horses were shipped from Des Moines over the line of the Rock Island Company required that

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they be accompanied by some one to take care of them for the owner, provision for transportation of one or more caretakers being made in the car itself, and two employees of the owner in fact accompanied the animals. As this contract provides that its conditions should be available to connecting carriers completing the transportation of the property from the terminus of the Rock Island Company to its destination the Great Northern Company was warranted in assuming that caretakers did accompany the horses to feed, water, and look after them, and the argument in this respect for the Great Northern Company is that it should not be held liable for any want of care of the horses to protect them from the effect of becoming chilled, as that duty was imposed by the contract upon the caretakers. It seems to be well settled that under such circumstances the carrier is not liable for failure to feed or water animals in course of transportation, unless it fails to furnish to the caretaker in charge of them proper facilities for the purpose when requested, or fails to afford facilities for unloading where unloading becomes necessary for that purpose. *Grieve v. Illinois Central R. Co.*, 104 Iowa, 659, 74 N. W. 192. But we think this rule does not relieve the carrier from liability for its negligent delay in transporting the animals to their destination, if such delay has as its proximate result an injury to the animals which the caretaker could not have prevented in the exercise of diligence. In this case there is evidence tending to show that horses in high condition, such as those usually transported for purposes of exhibition, are likely to become heated while the cars are in motion, owing to nervousness and excitement of the horses due to such motion, and to be chilled when the cars are allowed to stand for a considerable length of time, and that during the 15 hours elapsing between the delivery of the car containing plaintiff's horses to the transfer track ready to be taken by the Great Northern Company and their final delivery at the fair grounds a few miles away, plaintiff's horses did become chilled, and as a result one of them contracted a cold, from which illness it subsequently died. It also appears that after the Great Northern Company was notified that the car was ready for transfer to the fair grounds its agents were repeatedly urged to hasten the transfer of the car, in order that the horses might be unloaded, and that there was nothing which plaintiff's caretakers could do toward preventing the horses becoming chilled until they could be unloaded at the fair grounds. Conceding the rule to be that the burden of proof is on the plaintiff to show negligent delay on the part of the carrier, and injury therefrom as the proximate result reasonably to be anticipated from the delay, we think there was enough evidence to take the case to the jury on these questions. The agents of the transfer company were also agents of the Great Northern in this sense that it was only through the agents of the transfer company that the Great Northern Company could be

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advised that the car was ready for transportation by the latter company to its destination; and, as already stated, the agents of the Great Northern Company were advised without unreasonable delay of that fact. It appears also that the proper employees of the Great Northern Company were personally urged by the employees of plaintiff to facilitate the delivery of the car at the fair grounds, and the jury might have properly found under the evidence that there was an unreasonable delay on the part of the employees of the Great Northern Company in taking the car to the fair grounds as requested. Other cars ready for transfer at the same time were in fact transferred by the Great Northern Company to the fair grounds in a much shorter time. If there was any special excuse, such as unusual rush of business at the particular time, for not more promptly delivering the car at the fair grounds, it was for the Great Northern Company to show that fact. The evidence in the record tends to negative any such excuse. That the contract would not relieve the carrier from liability for negligence in failing to transport the horses to their destination in a reasonable time is settled in the case of *Grieve v. Illinois Central R. Co.*, already cited, and in *Wisecarver v. Chicago, R. I. & P. R. Co.*, 141 Iowa, 121, 119 N. W. 532.

We see no merit in the contention that the Great Northern Company was chargeable with no duty as to the transportation of this car of horses until a new shipping contract was made by it with the owner. A carrier is bound to accept and transport cars delivered to it for transportation without a special contract, and the car in question was delivered to the Great Northern Company for transportation when it was placed on its transfer track at Minneapolis, and it was notified of that fact. At no time, so far as appears from the evidence, was the plaintiff or any person representing him advised that the car would not be taken by the Great Northern Company until there was a new contract. Its employees undertook to transport the car without such contract, and in fact did transport it; but, as already indicated, the evidence tends to show that there was an unreasonable delay on its part in doing so.

We think that the case should have been submitted to the jury on the evidence as to the liability of the Great Northern Company, and the judgment in favor of that company is reversed.

BARTELT v. OREGON R. & NAVIGATION CO.

(Supreme Court of Washington, Jan. 17, 1910.)

[106 Pac. Rep. 487.]

Carriers—Shipment of Live Stock—Burden of Proof.*—A shipper of live stock, who agreed to load, unload, and reload, and feed, water, and tend the stock at his own risk, has the burden of proving that an injury to the stock occurred through the negligence of the carrier, and not from a failure on his part to perform the duties assumed by him.

Carriers—Contracts of Shipment—Validity.—A stipulation in a contract for the shipment of live stock that the shipper will load, unload, and reload the stock at his own risk, and will feed, water, and tend the same at his own risk—while the same are in any stockyard, is binding on the shipper.

Carriers—Contracts of Shipment—Validity.†—A carrier of live stock may not exempt itself from liability for any negligent act in transporting the same.

Carriers—Carriage of Live Stock—Negligence—Evidence.—In an action against a carrier for injuries to live stock transported under a contract stipulating that the shipper shall assume all risk of injury resulting from the natural propensities of the animals, evidence held to justify a finding that the injury to the animals was caused by the negligent operation of the train, authorizing a recovery.

Carriers—Carriage of Live Stock—Negligence—Evidence.—The fact that mares received by a carrier for transportation were heavy in foal was a fact apparent to the carrier, and it was chargeable with notice thereof.

Carriers—Carriage of Live Stock—Actions—Issues.—A carrier proceeding throughout the trial as though the issue of common-law negligence was properly joined could not, after the admission of the evidence without objection, raise the question that the action should have been founded on the written contract of shipment.

Carriers—Contract of Shipment—Validity—Presumptions.‡—A contract for the shipment of live stock, stipulating that, in consideration of a special reduced rate, the shipper agrees to load, unload, and reload stock at his own risk, and feed, water, and tend the same in any stockyards at his own expense and risk, and that he assumes risk of injury due to the natural propensities of the animals, is prima

*See foot-note of preceding case.

†See first foot-note of *McIntosh v. Oregon R. & N. Co.* (Idaho), 33 R. R. R. 768, 56 Am. & Eng. R. Cas., N. S., 768; first foot-note of *Wisecarver & Stone v. Chicago, etc., Ry. Co.* (Iowa), 33 R. R. R. 728, 56 Am. & Eng. R. Cas., N. S., 728.

‡See extensive note, 28 R. R. R. 479, 51 Am. & Eng. R. Cas., N. S., 479.

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facie binding as supported by a valid consideration, and the burden of proving absence of consideration in the way of a reduction in freight rates is on the shipper.

Carriers—Carriage of Live Stock—Negligence—Liability—Action—Nature and Form.—Where injury to live stock, transported under a contract stipulating that the shipper assumed risk of injury arising through the natural propensities of the animals, occurred from the negligent operation of the train, a liability of the carrier arose which was not covered by the limitations of contract, and an action based on the negligence was maintainable.

Appeal and Error—Harmless Error—Variance.—Where, in an action against a carrier for injury to a shipment of live stock, the issues of the negligent operation of the train, as a cause of the injury, and whether the injury occurred through the negligent discharge of duties assumed by the shipper, were presented and tried, the variance between the pleading alleging a common-law liability, and the proof that the shipment was transported under a special contract did not prejudice the carrier and would not justify a reversal, under Ballinger's Ann. Codes & St. §§ 4949-4951 (Pierce's Code, §§ 420-422), providing that a variance between the pleadings and the proof shall not be deemed material unless it should have misled the adverse party, etc.

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Herman Bartelt against the Oregon Railroad & Navigation Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. W. Cotton, W. A. Robbins, and Samuel R. Stern, for appellant.

Jno. L. Dirks, for respondent.

GOSE, J. This is a suit to recover damages from a common carrier for injuries to live stock resulting from its alleged negligence. The dereliction charged is that the appellant, in violation of its duty as a common carrier, so negligently and carelessly operated its cars that certain brood mares were bruised, injured, and maimed, while being transported over its road in the month of November, 1907. The appellant joined issue upon the charge of negligence, and alleged affirmatively that it transported two car loads of vicious, wild, and unruly horses for the respondent, from Huntington, Or., to Fairfield, Wash., upon the terms of a limited-liability live stock contract, and at a reduced rate; the material stipulations of the contract being: "In consideration of the special reduced rate herein provided for the transportation of the live stock above described, it is hereby stipulated and agreed as follows: (1) * * * (2) * * * (3) The

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shipper agrees to load, unload and reload all said stock at his own expense and risk, and to feed, water and tend the same at his own expense and risk while it is in any stockyards, whether the same be operated, owned, or controlled by said carriers, or otherwise, and while in the cars or at feeding points or at any place where the same may be unloaded for any purpose whatever. (4) The shipper assumes * * * all risk of injury which said live stock or any of them may receive in consequence of any of them being wild, unruly, weak, maiming each other, or themselves by or in consequence of heat or suffocation or any other ill effects of being crowded or injured. * * * (7) No carrier shall be liable for any loss or damage to said stock by causes beyond its control. * * *” The reply denied that the horses were wild, vicious, or unruly, and denied that they were carried at a reduced rate. Upon the issues thus joined the case was submitted to a jury, resulting in a verdict and judgment for the plaintiff, from which the defendant has appealed.

It is first urged that there is no evidence tending to show that the horses were injured through the appellant's negligence while in transit, and that the cause of the injury is speculative and conjectural. The respondent's agent accompanied the horses, and the burden was therefore on the respondent to prove that the injury occurred through the negligence of the appellant, and that it did not arise from a failure upon his part to perform the duties assumed by him in the contract of shipment. The obligation which he assumed, to load, unload, and water the stock, and to care for them while in the stockyards, was legal and binding upon him. The appellant could not, however, exempt itself from liability for any negligent act in transporting the horses, nor did it undertake to do so. These propositions are well settled. *Lewis v. Penn. Ry. Co.*, 70 N. J. Law, 132, 56 Atl. 128; *Terre Haute, etc., Ry. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239; *Penn. Ry. Co. v. Raiordon*, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670; *Normile v. Oregon Navigation Co.*, 41 Or. 181, 69 Pac. 928; *B. & O. S. Ry. Co. v. Ragsdale*, 14 Ind. App. 406, 42 N. E. 1106; 5 Am. & Eng. Enc. Law (2d Ed.) 308; *Hance v. Pacific Express Co.*, 66 Mo. App. 486; *St. Louis, etc., Ry. Co. v. Wells*, 81 Ark. 469, 99 S. W. 534; *Peterson v. Chicago, etc., Ry. Co.*, 19 S. D. 122, 102 N. W. 595. The court's instructions were in harmony with this view of the law. In holding that the burden is on the respondent to prove that the injury resulted from the negligence of the appellant, we do not intend to modify the rule expressed in *Jolliffe v. N. P. R. Co.*, 52 Wash. 433, 100 Pac. 977, where the injury to the live stock resulted from an unusual delay in the shipment on the part of the carrier, when the cause of the delay was known to the carrier and unknown to the shipper.

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Respecting the sufficiency of the evidence to support the verdict on the question of the negligence of the appellant, the admitted facts are: That the appellant received from the respondent at Huntington, Or., for shipment to Fairfield, Wash., two car loads of horses, consisting of 45 young, grade Percheron mares, and two saddle horses; that there were 24 head in one car and 23 head in the other; that from Umatilla to Riparia the train comprised 1 engine, 50 loaded cars, 14 empty cars, and a caboose; that when the horses were taken from the cars at Fairfield one had a dislocated shoulder, another a dislocated hip, another a mashed foot, and three of the mares had slipped their foals. Evidence was submitted to the jury which tended to show that the horses were properly loaded; that the number placed in each car, considering the size of the horses, was consistent with prudent handling; that the horses were unloaded and fed at Umatilla and reloaded in good condition; that after leaving that point, along the Snake river, the cars were chugged and jammed, as a witness expresses it, "most all the way along;" that the attendant inquired of the conductor the cause of the rough handling of the cars, and the latter informed him that the engine was overloaded, that it had too many cars, causing the engine to slip and the cars to jerk; that at Riparia the train was switched about the yards and jammed against other cars for a period of about two hours, and until the attendant complained of the switching and jamming to the yardmaster, and demanded that the cars with the horses should be set out; that they were then placed upon a switch and permitted unattended to run against other cars, with such force that two of the horses were thrown to the floor of the car. The appellant argues, however, that the mares were wild, range-raised, and heavy in foal, and that the injuries were occasioned by their natural propensities. There was evidence tending to show that the mares were barn and pasture raised and gentle, although some of them were unbroken; that the line of the Southern Pacific railroad extended along one side of the inclosure where they had been pastured; that they were accustomed to and were not frightened by trains; that they had been bred late in the season and were not heavy in foal. The testimony as to the rough handling of the train along the river and in the yards at Riparia is conflicting, but there is ample evidence in the record, direct and circumstantial, to justify the jury in concluding that the injury was referable to the negligent operation of the train at both points.

It is further contended that the evidence shows that the mares were heavy in foal, and that in the absence of notice of this fact, or of facts sufficient to charge the appellant with notice, this was a hidden defect, and that it can only be held to the exercise of reasonable care. The court instructed the jury that, if the injury resulted from the wild or vicious propensities of the horses, or be-

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cause they were worried, fretted, crowded, or maimed themselves, if the injury resulted from the mares being heavy in foal, there could be no recovery. The appellant was certainly not entitled to a more favorable instruction. Moreover, if the mares were heavy in foal, that fact was apparent to the carrier.

Finally, it is urged that "there is a fatal variance between the pleadings and the proof, in that plaintiff's complaint is an attempt to recover on an implied contract to carry and deliver as at common law, and plaintiff's own proof shows that the shipment moved under the terms of the special contract in evidence in this case, and that the alleged damage is within the terms of the special contract." The bill of lading was admitted in evidence as a part of the cross-examination of one of the respondent's witnesses. At the close of the respondent's case, the appellant moved for a nonsuit on two grounds, viz.: (1) That there was no evidence tending to show negligence; and (2) that the injury was due to the inherent vice of the animals. When all of the evidence had been submitted, defendant moved for a directed verdict, renewing the grounds stated in the former motion, and adding a third, viz., a variance between the pleading and the proof, in that a recovery was sought on the ground of common-law negligence when the shipment was made under a written contract. The evidence was admitted without objection. Orderly procedure, as well as the due administration of justice, forbids that the appellant may proceed throughout the trial as though the issue were properly joined, and then seek to raise the question that the action should have been bottomed upon the written contract. *Asplund v. Mattson*, 15 Wash. 328, 46 Pac. 341; *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780; *Fontenot v. Manuel*, 46 La. Ann. 1373, 16 South. 182; *Prenatt v. Rungon*, 12 Ind. 182. The contract, as we have seen, was *prima facie* legal and binding, and if there was no consideration for it in the way of a reduction in the rate, or in any other respect, the burden of proving such fact was on the respondent, and the court so charged the jury. The appellant was not therefore, as it contends, precluded from raising the question until it had proved a consideration for the contract.

But, regardless of the question of waiver, the contract did not, and for reasons of public policy could not, exempt the appellant from liability for its own negligent acts. If the injury to the horses occurred from the negligent operation of the train on which the horses were carried, a liability arose which was not covered by the contract, and an action predicated upon such negligence is maintainable. Our statute directs that the facts constituting the cause of action shall be stated in plain and concise language. 2 Ballinger's Ann. Codes & St. § 4906 (*Pierce's Code*, § 373). The complaint alleges the delivery and acceptance of the horses for shipment, the negligent operation

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of the train, and the resultant injury. The issue and the method of trial would have been the same if the pleader had set forth the bill of lading in *hac verba*. The Code (2 Ballinger's Ann. Codes & St. § 4949 [Pierce's Code, § 420]), provides that no variance between the allegations in the pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Section 4950 provides that, when the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. Section 4951 provides that, when the cause of action to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof. Guided by these principles, it is as clear as the mathematical rules of addition and subtraction that the issue of negligence was clearly and sharply defined, and that no prejudice resulted to the appellant. If injury arose from the appellant's negligence, as the complaint charges, it was liable in damages. If it occurred through the negligent discharge of the duties assumed by the respondent, no cause of action existed. This view is concisely expressed by Justice Wolverton, in *Normile v. Oregon Navigation Co.*, 41 Or. 181, 69 Pac. 929, in the following language: "It is seldom that bills of lading showing the contractual and correlative relations and obligations of the carrier and shipper relative to the shipment are drafted with a view to changing or restricting all the common-law liabilities to which the carrier is subjected; and if any remain upon which an action may be founded and recovery had without coming in conflict with special limitations and restrictions, there exists no reason why the common-law action may not be maintained, notwithstanding the special contract." The same rule was announced by the Court of Appeals for the Eighth Circuit, speaking through Justice Thayer, in *Southern Pacific Company v. Arnett*, 111 Fed. 849, 852, 50 C. C. A. 17, 20, where it is said: "* * * We are aware of no rule of law which requires a shipper who has made a special contract to declare upon it, when he contends that the carrier has been guilty of some neglect of duty on account of which he is liable notwithstanding the provisions of the contract. A special contract, where exacted by a carrier, is a defensive weapon, to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection." In 6 Cyc. 513, the opinion is expressed that this is the better rule.

We are aware that there are many cases which hold that the action must be brought on the written contract of shipment; but, in view of the fact that the question is an open one in this juris-

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diction, we have adopted the view which we think best harmonizes with the spirit of the Code practice. A reading of the cases which hold the contrary view will, we apprehend, disclose the fact that judges of acknowledged ability have been guided by the old rules of pleadings rather than the liberal rules of the reformed procedure.

The judgment will be affirmed.

RUDKIN, C. J., and CHADWICK, FULLERTON, and MORRIS, JJ., concur.

KANSAS CITY SOUTHERN RY. CO. v. CARL.

(Supreme Court of Arkansas, June 14, 1909.)

[121 S. W. Rep. 932.]

Carriers—Carriage of Goods—Loss of Freight—Actions—Presumptions.*—Where the initial carrier receives goods for transportation to another state by a connecting carrier, in absence of contrary evidence it is presumed that the goods were lost en route through the negligence of the last carrier, and the burden is on it to show that the loss did not occur on its line.

Carriers—Carriage of Goods—Contracts against Loss by Negligence.†—Public policy forbids a common carrier from exempting itself by contract from damages for loss by its own negligence.

Carriers—Freight—Contract—Limiting Connecting Carrier's Liability—Validity.—The Hepburn amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 906]) to the interstate commerce act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]) makes interstate carriers liable for loss or injury to property caused by it, prohibits contracts exempting the carrier from the liability thereby imposed, and provides that the carrier issuing the freight receipt or bill of lading may recover from the carrier on whose line the injury occurred any damages it may be required to pay the owner. Held, that the act made invalid all contracts limiting a carrier's liability for loss of freight, and an initial carrier could not contract to limit the liability of a connecting carrier.

Appeal and Error—Harmless Error—Prejudicial Effect—Judgment Correct on Merits.—Where the judgment was correct under the undisputed evidence, no errors in instructions could have been prejudicial.

Appeal from Circuit Court, Benton County; J. S. Maples, Judge.

*See second foot-note of Philadelphia, etc., R. Co. v. Diffendal (Md.), 32 R. R. R. 364, 55 Am. & Eng. R. Cas., N. S., 364.

†See second foot-note of preceding case.

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Action by J. M. Carl against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for loss of a box of household goods shipped from Lawton, Okl., to Gentry, Ark. The suit was brought before a justice of the peace in Benton county, Ark., and judgment was rendered in favor of the plaintiff. The case was duly appealed to the Benton circuit court. On a trial anew in that court, the plaintiff testified that on October 8, 1907, he delivered to the Chicago, Rock Island & Pacific Railway Company at Lawton, Okl., two boxes and one barrel, containing household goods, and that he signed a contract and received a bill of lading. The goods were consigned to himself at Gentry, Ark. He received the barrel of goods, and also one of the boxes; but one of the boxes was never received. The value of the goods as testified to by the plaintiff exceeded the sum of \$75. The defense of the railway company was that the goods were shipped upon a contract between the plaintiff and the Chicago, Rock Island & Pacific Railway Company and its connecting carriers; that the defendant is one of the connecting carriers, and is entitled to the benefit of all the provisions of said contract; that said contract contained a stipulation that in consideration that the plaintiff would receive the lower of two freight rates, in case of loss, said goods should be valued at \$5 per cwt.; that all of the goods received weighed 400 pounds; that there was delivered to the plaintiff by the defendant 300 pounds of said goods. The jury returned a verdict for plaintiff for \$75, and the defendant has appealed from the judgment rendered.

Read & McDonough, for appellant.

HART, J. (after stating the facts as above). Counsel for appellant urge that upon the undisputed evidence the court should have directed a verdict for appellant. They rely for a reversal on the clause in the contract with the initial carrier limiting the liability as to value in case of loss. They contend that the stipulations restricting the liability in case of loss were made for their benefit as well as for the benefit of the initial carrier, and base their contention on our decisions to that effect in the cases of *St. L., I. M. & S. Ry. Co. v. Weakly*, 50 Ark. 406, 8 S. W. 134, 7 Am. St. Rep. 104; *St. L. & S. F. R. Co. v. Burgin*, 83 Ark. 502, 104 S. W. 161, and cases cited. But in making their contention they have not taken into consideration the effect of the Hepburn amendment (Act June 29, 1906, c. 359, 34 Stat. 584 [U. S. Comp. St. Supp. 1907, p. 892]) to the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), which became effective on June 29, 1906, a date prior to the time the contract in question was made. That

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part of the Hepburn act which applies to the present case is contained in section 7, which reads as follows: "That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." "That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." The undisputed evidence shows that the initial carrier received the property for transportation from a point in one state to a point in another state, and the presumption in the absence of evidence to the contrary was, as will be seen from our decisions herein-after referred to, that the goods were lost through the negligence of appellant, the last carrier. The section of the Hepburn act above quoted makes the carrier liable "for any loss, damage or injury to such property caused by it * * * and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed." The express terms of the act make the carrier liable for any loss caused by it, and provide that no contract shall exempt it from the liability imposed. It is manifest that the act renders invalid, all stipulations designed to limit liability for losses caused by the carrier. Public policy forbids that a public carrier should by contract exempt itself from the consequences of its own negligence. For the same reason, a statute may prohibit it from making stipulations in a contract which provide for such partial exemption. If the initial carrier is prohibited from making a contract limiting its own liability, it is obvious that it could not make a contract limiting the liability of its connecting carriers; for the section of the Hepburn act under discussion provides that the carrier issuing the bill of lading may recover from the connecting carrier on whose line the loss occurs the amount of the loss it may be required to pay the owner. "The act expressly invalidates all stipulations designed to limit liability for losses caused by the carrier." In the Matter of Released Rates, 13 Interst. Com. R. 550.

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In the case of *St. Louis Southwestern Ry. Co. v. Grayson & Seitz* (Ark.) 115 S. W. 933, we held that a restriction of the liability of a carrier to loss upon its own line is violation of the Hepburn act, making the initial carrier liable for damage to an interstate shipment whether it occurs on its own line or on its connecting lines, and in support of the decision cited the case of *Smeltzer v. St. L. & S. F. R. Co.* (C. C.) 158 Fed. 649. The validity of this clause of the Hepburn act has also been sustained by the Court of Appeals of the state of Georgia in the case of *Southern Pacific Company v. Crenshaw Bros.*, 5 Ga. App. 675, 63 S. E. 865. Therefore we hold that the contract in question was prohibited by the terms of the Hepburn act, and is invalid in so far as it attempts to limit the liability of the carrier in case of loss caused by it. This case is distinguished from the case of *St. L., I. M. & S. Ry. Co. v. Furlow* (Ark.) 117 S. W. 517, and *St. L. & San Francisco Rd. Co. v. Keller* (Ark.) 119 S. W. 254, where we held that a stipulation in a contract for an interstate shipment which required notice in writing of the loss to be given within a specified time, if reasonable, was not in conflict with the provisions of the Hepburn act. The stipulation in question there did not exempt the carrier from any liability imposed by the Hepburn act. They were mostly rules or regulations adopted by the carrier for the purpose of securing it from fraud and imposition. Having held the contract of shipment invalid in so far as it restricted the liability of the carrier as to the value of the goods shipped in case of loss because such restriction was in violation of the provisions of the Hepburn act, the cause stands as if the Chicago, Rock Island & Pacific Railroad Company had accepted the goods for shipment from Lawton, Okl., to Gentry, Ark., and the appellant was the last carrier of the goods. "Where goods are shipped over connecting lines of carriers on a through bill of lading, and on reaching their destination a box is missing, in an action therefor against the last carrier the burden of proof is on it to show that the loss did not occur on its line." To the same effect, see *St. L. S. W. Ry. Co. v. Birdwell*, 72 Ark. 502, 82 S. W. 835; *K. C. So. Ry. Co. v. Embury*, 76 Ark. 589, 90 S. W. 15; *Midland Valley Rd. Co. v. Hale*, 86 Ark. 483, 11 S. W. 646. In this case the undisputed evidence shows that the goods were delivered to the initial carrier, and there is nothing to rebut the presumption that they were received by appellant, the last carrier, and lost through its negligence. Hence, under the undisputed evidence as disclosed by the record, appellant was liable for the amount recovered. The judgment being right upon the undisputed testimony, no prejudice could have resulted to appellant from any instruction given by the court. *St. L. S. W. Ry. Co. v. Grayson & Seitz*, *supra*. Therefore it will not be necessary to discuss the correctness of the instructions given by the court, and the judgment will stand affirmed.

PATTERSON *et al.* v. MISSOURI, K. & T. RY. CO.

(Supreme Court of Oklahoma, Sept. 14, 1909.)

[104 Pac. Rep. 31.]

Carriers—Carriage of Live Stock—Notice of Loss.—Hogs that died in the car, and are removed therefrom in transit by the employees of the railway company, are not within a clause of the contract of shipment requiring the shipper, as a condition precedent to his right to recover any damages for any loss or injury to said stock resulting from the carrier's negligence, to give notice in writing to the conductor in charge of the train or to the nearest station or freight agent of the carrier on whose line the injuries occur before said car leaves that carrier's line, or before the live stock are mingled with other live stock or removed from pens at destination.

Pleading—Appeal and Error—Issues, Proof, and Variance—Presentation and Reservation of Grounds of Review—Questions Not Presented Below.—If proof is offered of an issue or of a single fact different from that stated in the pleadings, but not amounting to a failure of proof, and no objection is made by the adverse party, it is of no consequence. The objection is not available in the reviewing court. It is too late then.

Pleading—Issues, Proof, and Variance.—No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits.

Carriers—Carriage of Freight—Exemption from Liability—Burden of Proof.*—If the carrier seeks to escape liability on the ground that the loss of or injury to the goods is one excepted by a valid special contract, he has the burden of proving, not only the making of such special contract, but also that the loss or injury for which the action is brought falls within a specified exception contained in such special contract.

Negligence—Questions for Jury—Contributory Negligence.—Negligence and contributory negligence are usually questions for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

Carriers—Carriage of Live Stock—Care of.†—If the shipper specially

*For the authorities in this series on the subject of the burden of proving the existence of a contract exempting the carrier from liability, see extensive note, 26 R. R. R. 334, 49 Am. & Eng. R. Cas., N. S., 334.

For the authorities in this series on the subject of the burden of proving that loss of or injury to freight is within the contract exemption clause, see extensive note, 26 R. R. R. 334, 49 Am. & Eng. R. Cas., N. S., 334.

†See extensive note, 9 R. R. R. 6, 32 Am. & Eng. R. Cas., N. S., 6.

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agrees, as a part of the contract of transportation, that he or his agents will care for the animals and attend to feeding and watering them, the carrier is thereby relieved from liability so far as opportunity of caring for, feeding, and watering the animals is afforded him. And, if damages result from the failure of the shipper under such circumstances to have the animals cared for, he cannot hold the carrier responsible. Nevertheless, if the carrier is aware that no one is accompanying the animals to care for them, his duty to give them proper attention is the same as though no contract for care by the shipper had been made.

(Syllabus by the Court.)

Error from District Court, Pawnee County; Bayard T. Hainer, Judge.

Action by J. W. Patterson and another against the Missouri, Kansas & Texas Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Poe, Biddison, Campbell & Eagleton, for plaintiffs in error.

Clifford L. Jackson, John E. Du Mars, and Horace Speed, for defendant in error.

KANE, C. J. This was an action for damages, commenced by the plaintiffs in error, plaintiffs below, against the defendant in error, defendant below, for a failure to deliver certain hogs which by the terms of a written contract the defendant agreed to transport from Jennings, Okl., to the city of St. Louis, Mo. The petition alleges, in substance, that the defendant, a common carrier, failed to deliver 20 head of hogs out of a car of 90 hogs shipped by plaintiff over the defendant's railroad from the town of Jennings, Okl., to the city of St. Louis, Mo., and prays for damages occasioned by such nondelivery in the sum of \$251.56. The plaintiff attached to his petition a purported copy of the special live stock contract under which the hogs were shipped. The answer, to which is also attached and made a part thereof a purported copy of the shipping contract between the parties, consists of a general denial and several special defenses, of which we will notice only those called to our attention by the briefs of counsel. The allegations of the answer necessary to note are to the effect that the defendant under the terms of said contract let to said plaintiff one car, as stated by plaintiff in his petition; that his agents, servants, and employees loaded into said car 90 head of hogs, which number overloaded the capacity of said car; and that by reason of said car being overloaded a large number of hogs, to wit, the number of 20, died between the town of Jennings, Okl., and the town of Sedalia, in the state of Missouri, and that said 20 head of hogs were removed by defendant's agents and employees at the town of Sedalia, and that said removal of said dead hogs was necessary to the safe trans-

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portation of the remaining 70 hogs, and that said carrier carried the said last-mentioned 70 hogs to their destination promptly and safely, and that the last-mentioned 70 hogs were in good condition upon reaching destination; that the said car was carefully handled by said defendant, and the death of said hogs was due solely to the action of plaintiff in negligently and carelessly overloading and crowding the same. For reply the plaintiff filed a general denial. Upon the issues thus joined the cause was tried and submitted to a jury, and, after the evidence was all in, the court peremptorily instructed the jury to return a verdict for the defendant upon the grounds, first, that the evidence was insufficient to show that any claim had been presented to the railroad company according to the terms of the contract; and, second, that no negligence was shown on the part of the railroad company. The jury returned a verdict in accordance with the instructions of the court, upon which judgment was entered, and the cause was in due time taken to this court by petition in error.

The clause of the contract pertaining to giving notice of any loss or injury reads as follows: "The shipper further expressly agrees that as a condition precedent to his right to recover any damages for any loss or injury to said live stock resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train or to the nearest station or freight agent of the carrier on whose line the injuries occur before said cars leave that carrier's line or before the live stock are mingled with other live stock or removed from pens at destination. In this notice he shall state place and nature of the injuries to the end that they may be fully and fairly investigated, and said shippers shall within 30 days after the happening of the injuries complained of file with some freight or station agent of the carrier on whose line the injuries occurred his claim therefor, giving the amount. Shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said live stock as aforesaid, and no suit shall be brought against any carrier, and only against the carrier on whose line the injuries occurred, after the lapse of 90 days from the happening thereof, any statute or limitation to the contrary notwithstanding, and no damages can be recovered except those set forth in the required notice and claim." Another clause of the contract provided: "The carrier shall only be liable for such damages as may result to said live stock from the negligent transportation or handling of said cars after they are delivered to it as aforesaid at point of shipment and intermediate points where they have been unloaded by shipper for any purpose, and the shipper shall bear all damages resulting from his negligent doing or failure to do any of the things which he hereby contracts to do, or from the negligence of any of his servants."

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The case at bar as disclosed by the pleadings does not fall within that class of cases wherein it has been held that the notice required by the contract is a condition precedent to recovery. The purpose in giving such notice is that the railway company may have a fair and reasonable opportunity to make an examination and inspection of the live stock transported before it shall be placed beyond its reach or beyond the possibility of some certain identification. The answer in this case stated that the 20 dead hogs died in transit, and were removed from the car by defendant's agents and employees, and that such removal was necessary to the safe transportation of the remaining hogs. As was said by Mr. Justice Milton in *Wichita & W. Ry. Co. v. Koch*, 8 Kan. App. 642, 56 Pac. 538: "Under the facts of this case, the only purpose a written notice of the claim for damages could have served would have been to give the railroad company an opportunity to settle the claim without suit. No inspection or investigation as to the condition of the 18 hogs that had perished was necessary. The company already had full knowledge thereof." In *Kansas & A. V. R. Co. v. Ayres*, 63 Ark. 331, 38 S. W. 515, Mr. Justice Hughes, who delivered the opinion of the court, in discussing this proposition, says: "The cattle that were dead in the car before the stock were removed and mingled with other cattle are not within this provision of the contract as to notice. The object in requiring the notice by the shipper of his intention to claim damages to be given before the cattle were removed and mingled with other cattle was to afford the railway company a fair opportunity to examine the cattle before they were removed and mingled with other cattle. As to these that were dead, the company had all the opportunity it could have had to examine them." Other cases to the same effect are *C., C. & St. L. Ry. Co. v. Potts & Co.*, 33 Ind. App. 564, 71 N. E. 685, and *M., K. & T. Ry. Co. v. Fry*, 74 Kan. 546, 87 Pac. 754.

Indeed, counsel for defendant in error in their brief do not seriously insist that under the circumstances strict compliance with this clause was necessary to a recovery, but claim that there was a fatal variance between the contract declared upon by the plaintiff and the one established by the evidence. There was, we think, a variance between the allegations of the petition and the proof, but no variance was complained of in the court below, and it was never suggested that the defendant was misled thereby to its prejudice in maintaining its defense upon the merits. Further, the defendant answered setting up the contract of shipment in the form it was afterwards, without objection introduced in evidence, and thereafter there was no misunderstanding or dispute as to its contents. It is well settled that even a fatally defective petition may be cured by the allegations of an answer. *Irwin v. Paulett et al.*, 1 Kan. 418; *Barkley et al. v. State*, 15 Kan. 99. In *Grandstaff et ux. v. Brown et al.*, 23

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Kan. 176, it is held that if anything should intervene between the filing of the petition and the final rendering of judgment which could by a fair and reasonable intendment be construed to cure the defective allegations of the petition, the courts will hold that such defective allegations are thereby cured. In the case at bar the actual contract entered into by the parties was introduced in evidence without objection, and there seems to have been no misapprehension on the part of any of the parties to the action as to its actual contents. Mr. Bates, in his work on Pleading and Practice, 1 Bates P. & P., p. 526, states the rule as follows: "If proof is offered of an issue or of a single fact different from that stated in the pleadings, but not amounting to a failure of proof, and no objection is made by the adverse party, it is of no consequence. The objection is not available in the reviewing court. It is too late then. Failure to have ordered the amendment is of no consequence." The same author, on page 527, *supra*, discussing the rule as to variance, further says: "If it has misled the other party, it is material; otherwise not. The inquiry is then whether he was misled. The party objecting must prove that he has been misled." The foregoing excerpts seem to be in harmony with our Code of Civil Procedure. Section 4337, Wilson's Okl. Rev. & Ann. St. 1903, provides that: "No variance between the allegations, in a pleading, and the proof, is to be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended, upon such terms as may be just." The general rule is stated in 22 Enc. of P. & P. 640, as follows: "A variance may be waived by failing to object at the proper time to the admission of evidence on the ground that it does not correspond to the allegations of the pleading in support of which it is offered, by admission in the pleading of the party who would otherwise be in a position to take advantage of the variance, or by a failure to allege surprise, seek postponement of the trial, or take other steps that are essential to make the question of variance available on appeal." We are of the opinion that under the foregoing authorities and provision of our statute the question of variance is not available to the defendant in this court.

The second ground upon which the court directed a verdict is that no negligence was shown on the part of the company. From an examination of that part of the answer of the defendant heretofore referred to, it will appear that the defendant admitted the death of the 20 head of hogs and their removal from the car at Sedalia, and further alleged that said car was carefully handled by said defendant, and that the death of said hogs

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was due solely to the action of plaintiff in negligently and carelessly overloading and crowding the same. Evidence was introduced in support of this theory. The railroad endeavored to prove that the hogs were smothered by overloading and the general neglect of the plaintiff. On the other hand, evidence was introduced tending to prove that the car was not overcrowded, and some evidence was offered tending to show that they came to their death by reason of the negligence of the employees of the railroad company in turning large quantities of cold water on them when they were in a heated condition. While we are of the opinion that under the shipper's contract in this case it was necessary to show negligence on the part of the carrier in order to make a case against it, we cannot agree with the court below that no negligence was shown on the part of the company. There was a conflict in the evidence on the question as to whether the car was overloaded or not, some of the witnesses testifying that the load was not excessive for the size of the car used, and that the number of hogs at the weight of these hogs could properly be shipped in such a car. Not only this, but several witnesses testified on rebuttal, that the defendant turned cold water from its water tanks along its route into the car upon the hogs, and that pouring this cold water upon them in the heated condition they were in, would very likely produce instant death. We think this evidence was sufficient to send the case to the jury on the question of negligence of the carrier.

In *Southern Pac. Co. v. Arnett et al.*, 111 Fed. 849, 50 C. C. A. 17, Thayer, Circuit Judge, who delivered the opinion of the court, says: * * * We are aware of no rule of law which requires a shipper who has made a special contract to declare upon it when he contends that the carrier has been guilty of some neglect of duty on account of which he is liable notwithstanding the provision of the contract. A special contract, when exacted by a carrier, is a defensive weapon, to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection." The practice approved by the foregoing opinion seems to have been followed by counsel for defendant. He set up the contract of shipment limiting the common-law liability of the carrier, and voluntarily assumed the burden of proof on the question of negligence. The general rule is stated in 6 Cyc. 519, as follows: "So, if the carrier seeks to escape liability on the ground that the loss of or injury to the goods is one excepted by a valid special contract, he has the burden of proving, not only the making of such special contract, but also that the loss or injury for which action is brought falls within a specified exception contained in such special contract." We think it was error for the court below to take the case from the jury. "Negligence and contributory negligence are usually questions for the jury. It is only where the

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facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." *St. L. & S. F. R. Co. v. Cope-land*, 102 Pac. 104, an Oklahoma case not yet officially reported.

The point is made by counsel for defendant in error in their brief that no one accompanied the stock as caretaker on behalf of the plaintiff in error as was required by a clause of the special contract. The pleadings and evidence show that the carrier knew that no one was accompanying this shipment, and, where this is true, it must give the necessary attention regardless of the contract. "If the shipper specially agrees, as a part of the contract of transportation, that he or his agents will care for the animals and attend to feeding and watering them, the carrier is thereby relieved from liability so far as opportunity of caring for, feeding, and watering the animals is afforded him; and, if damage results from the failure of the shipper under such circumstances to have the animals cared for, he cannot hold the carrier responsible. Nevertheless, if the carrier is aware that no one is accompanying the animals to care for them, his duty to give them proper attention is the same as though no contract for care by the shipper had been made." 6 Cyc. 438.

The judgment of the court below is reversed, and the cause remanded, with directions to grant a new trial.

DUNN, WILLIAMS, HAYES, and TURNER, JJ., concur.

YAZOO & M. V. R. CO. *v.* GREENWOOD GROCERY CO.

(Supreme Court of Mississippi, Feb. 28, 1910.)

[51 So. Rep. 450.]

Commerce—Means and Methods of Regulation—Demurrage.*—The State Railroad Commission may fix reciprocal demurrage rules, making the carrier liable for delays in delivery of interstate shipments after arrival at the point of consignment, since this imposes no additional duty on the carrier, but merely compels the fulfillment of a duty that is an incident to the contract of carriage, and is in aid of commerce, rather than an obstruction to it, and operates after the transportation is completed.

Appeal from Circuit Court, Leflore County; Sydney Smith, Judge.

Action by the Yazoo & Mississippi Valley Railroad Company against the Greenwood Grocery Company. From an adverse judgment, plaintiff appeals. Affirmed.

The following statement of facts is agreed on by and between the parties hereto, to wit:

"(1) The Yazoo & Mississippi Valley Railroad Company, plaintiff, is a corporation and common carrier handling interstate railroad shipments into and out of Greenwood, Miss., with a switchyard and side tracks in Greenwood, and a side track running to the warehouse of the Greenwood Grocery Company which is situated on the right of way and grounds of the Yazoo & Mississippi Valley Railroad Company.

"(2) The Greenwood Grocery Company, defendant, is a corporation doing a wholesale grocery business at Greenwood, with its warehouse located as stated.

"(3) Numerous cars containing interstate shipments, consigned to the Greenwood Grocery Company at Greenwood, Miss., were received at different points on its line by the Yazoo & Mississippi Valley Railroad Company for delivery to the Greenwood Grocery Company at Greenwood, and arrived there over the plaintiff's tracks. These cars were placed on the warehouse track of the defendant, according to custom, to be unloaded, and there

*For the authorities in this series on the subject of the validity of state regulations which may affect interstate commerce, see last foot-note of *DeRochemont v. New York*, etc., R. R. (N. H.), 32 R. R. R. 285, 55 Am. & Eng. R. Cas., N. S., 285; last foot-note of *Yazoo & M. V. R. Co. v. Bent & Co.* (Miss.), 31 R. R. R. 622, 54 Am. & Eng. R. Cas., N. S., 622; first foot-note of *Reid & Beam v. Southern Ry. Co.* (N. Car.), 31 R. R. R. 352, 54 Am. & Eng. R. Cas., N. S., 352; foot-note of *City Council v. Augusta & A. Ry. Co.* (Ga.), 31 R. R. R. 33, 54 Am. & Eng. R. Cas., N. S., 33.

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remained for the time shown by plaintiff's statement of claim filed herein before being unloaded by defendant. Plaintiff now claims and sues for demurrage for \$67, which amount is admitted to be a reasonable charge, and is admitted to be correct, as shown by the said statement of plaintiff; and the plaintiff is entitled to recover said amount, if the court should refuse to allow set-off claimed by defendant.

"(4) Numerous cars containing interstate shipments consigned to defendant at Greenwood were received by plaintiff at different points on its line of railroad for transportation and delivery to the defendant at Greenwood, and arrived there over plaintiff's tracks. Plaintiff then held said cars in its yards at Greenwood for the various times shown by statement of defendant filed herewith, which is admitted to be correct, without delivering them to the defendant. Defendant claims delayage under the rules of the Mississippi Railroad Commission for \$58, the same being figured on the basis of \$1 per day per car, which is admitted to be a reasonable charge, and is admitted to be correct, as shown by the statement above mentioned, and asks that the same be allowed as a set-off against the claim of plaintiff; defendant also tenders \$9, difference in accounts, interest, and court costs already accrued, which plaintiff refused.

"(5) The issue herein submitted is whether or not defendant can offset in this action by plaintiff its claim for delayage on cars containing interstate shipments, received by plaintiff, but delayed in its yard at destination before delivery by plaintiff to defendant, as against claim of plaintiff for demurrage charges against defendant which accrued at Greenwood, Miss., on cars containing interstate shipments to defendant, and after plaintiff had notified defendant of the receipt of said cars, and had placed them for unloading at defendant's warehouse, its place of business, according to custom, which cars were delayed in unloading after they had been placed for unloading as shown by plaintiff's statement; plaintiff's contention being that the delayage rules of the Mississippi Railroad Commission, so far as they apply to delays arising after the arrival of cars in the yards of plaintiff at destination, but before delivery at warehouse of defendant, are unconstitutional and void, if the cars contained interstate shipments.

"(6) The copy of the demurrage and delayage rules of the Mississippi Railroad Commission, hereto attached, is correct, and may be considered in evidence on the trial of this cause."

Mayes & Longstreet, for appellant.

Pollard & Hamner, for appellee.

MAYES, J. This suit was begun in a justice court of Leflore county by appellant, and the purpose of the suit is to recover from the Greenwood Grocery Company the sum of \$67, claimed by appellant to be due it by appellee as demurrage on certain cars con-

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taining interstate shipments of goods to appellee. The Greenwood Grocery Company undertook to offset this claim with a counterclaim of \$58, claimed by it to be due it by appellant as reciprocal demurrage charges. The case was tried in the justice court, and appealed to the circuit court, and tried on an agreed record. In the agreed record the facts are stated as concisely as it is possible for them to be stated, and we shall therefore only touch upon the leading features of the case in so far as the facts are concerned. It is agreed that the cars about which the Greenwood Grocery Company claims the right of reciprocal demurrage contained interstate shipments.

The real issue in the case is whether or not the Greenwood Grocery Company can offset its claim for reciprocal demurrage against the claim of plaintiff for demurrage charges against it. It is asserted by appellant that this cannot be done, for the reason that the cars contained interstate shipments, and to allow this offset would be in violation of the federal laws. The reciprocal demurrage claim of the Greenwood Grocery Company grows out of delays on the part of appellant, occurring in the yards of appellant, and after the interstate shipment reached its destination. No question of the unreasonableness of the delayage charges is involved in this case in any way. As counsel for appellant put it in their brief: "The sole question in the case is whether it is competent for the State Railroad Commission to promulgate a reciprocal demurrage or delayage rule, which would impose upon the railroad company a charge for delay in the delivery of an interstate shipment. It is a question of the power of the Railroad Commission to act in the premises." The trial in the court below resulted in a judgment in favor of the Greenwood Grocery Company, thereby sustaining the power of the commission to impose these delayage charges on interstate shipments, and from this judgment an appeal is prosecuted here.

We may say in the outset that the right and power of the State Railroad Commission to establish these delayage charges, in so far as intrastate shipments are concerned, was upheld in the case of *Y. & M. V. Railroad Company v. Keystone Lumber Co.*, 90 Miss. 391, 43 South. 605. In the above case there was no question of interstate commerce involved. We may further state that we do not deem it necessary to a decision in this case to determine when a shipment of goods loses its character as interstate commerce. The appellants deny the power of the State Railroad Commission to promulgate any reciprocal demurrage rule which imposes a charge for delay on appellant, when the charge is sought to be applied to any interstate shipment.

The first case which counsel for appellant cite as sustaining this contention is the case of *McNeill v. Southern Ry. Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142. This case does not seem to us to sustain the contention. Let us see what the facts

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of the McNeill Case were. The Greensboro Ice & Coal Company had a coal and wood yard located some distance from the main track and right of way of the Southern Railroad Company. From this main track there was a private spur track leading over the land of private persons to the ice and coal company's place of business. It seems that the railroad had delivered the freight of the ice and coal company at its place of business by hauling it over this spur at one time; but, a dispute having arisen between the railroad company and the ice and coal company concerning demurrage on 13 cars of coal and wood, the railroad notified it that thereafter it would only deliver its cars on the public track of the railroad known as the "team" track, on which track all deliveries were made to the public generally. Subsequently the ice and coal company ordered other coal and wood for interstate shipment over the line of the railroad, and when it arrived the railroad company placed it on the track and notified the ice and coal company. The coal company declined to receive the cars elsewhere than on the spur track, and the railroad company declined to deliver same here. A complaint was filed by the coal company with the Corporations Commission, and that commission ordered the railroad company to make delivery beyond its right of way and on the private siding. On the above facts, the court held that the order of the commission was void, because it required carriers engaged in interstate commerce to deliver cars containing such commerce beyond their right of way and to a private siding, thus manifestly imposing a burden so direct and onerous as to leave no doubt that it was a regulation of interstate commerce. But in this very case the Supreme Court of the United States says that it does not draw in question the right of a state, in the exercise of its police authority, to confer on an administrative agency the power to make any reasonable regulations concerning the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce.

There is a marked distinction between the McNeill Case, above quoted from and cited, and the case now being reviewed by the court. In the McNeill Case it was sought to compel the railroad company to haul the goods beyond the line of the company and beyond their proper destination; that is to say, carry them over a private siding to the place of business of the consignee. But in the case under review there is no such attempt. The rule simply operates to compel a reasonably quick delivery to the consignee on the main line of the railway, and amounts to nothing more than a regulation as to the time of delivery, the reasonableness of which is not questioned. It is simply claimed by appellant that, whether reasonable or unreasonable, the Railroad Commission has no power to make this regulation as to interstate shipments. When the whole of the regulation is simply addressed to compelling prompt delivery of the goods, thus enabling the cars to be

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placed in service for other shippers more speedily, what burden can it be said that such a regulation imposes on commerce? It does not seem to us that the case of *McNeill v. Southern Railroad Company*, cited above, can be said to be any authority for appellant; but it is more an authority for appellee when the facts are analyzed.

The next case mainly relied upon by appellant's counsel is the case of *Houston R. R. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772. An analysis of this case in the light of its facts easily distinguishes it from the case on trial. The case last cited involved the constitutionality of a Texas statute which provided that whenever a shipper should make requisition, in writing, for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and should deposit one-fourth of the freight with the agent of the company, the company failing to furnish the cars should forfeit \$25 per day for each car failed to be furnished; the only proviso being that the law should not apply in case of strikes or other public calamity. The court held the statute void as applied to interstate commerce, but also said that the statute was not far from the line of proper police regulation. We do not think any principle announced by the *Mayes* Case, cited above, is controlling here, or that the contention of appellees in any way conflicts with the principles announced in either of the cases already cited.

Several other cases are cited by counsel for appellants, but it is our judgment that these cases cannot be relied on as authority by appellants. The cases to which we allude are *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *U. S. v. Railway (D. C.)* 149 Fed. 486; *State v. Adams Express Co.*, 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93; *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972.

Much of the difficulty in this case is dissolved when we keep in mind the fact that the whole of the duty of a railroad company is not discharged in an interstate shipment merely by the transportation of the goods to point of destination. The railroad company owes the further duty, under the general law of the land, to deliver the goods to the consignee. In order to do this it is bound to so place the goods as that the consignee may get possession of them; else it fails in its duty, and the goods can be of no use to the owner of same. This being so, the order of the Railroad Commission fixing delayage charges is merely an order enforcing a general duty that rests upon the carrier, and is in aid of, and not an obstruction to, commerce. Such an order imposes no additional burden on the carrier. The burden is already there as a common duty. It is a part of the contract of carriage, and the consideration paid by the shipper for the transportation of the goods is paid in part for the fulfillment of this very duty. The grocer can make no use of his goods until he can

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unload them from the cars, the cars cannot be further used for transportation until they are unloaded, the cars cannot be unloaded until they are so placed as that they may be reached for this purpose, and it is the duty of the carrier to arrange for all these things, whether the shipment be intra or inter state, failing in which the very purpose of transportation itself fails. In view of these facts, how can it be held that a regulation, which merely compels a performance of an already existing burden, can be said to impose any additional burden on commerce?

In the case of *Charles v. Atlantic Coast Line*, 78 S. C. 36, 58 S. E. 927, 125 Am. St. Rep. 762, it appears that South Carolina had a statute imposing a penalty of \$50 on every common carrier that failed to adjust any claim for loss or damage to freight while in its possession within a certain period therein named. It was argued that this statute was void as to interstate shipments, but the court said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose, viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end.' While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier, and, in so far as it may affect interstate commerce, it is an aid thereto, by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages." In the case of *Harrill v. Railway Co.*, 144 N. C. 532, 57 S. E. 383, it seems that a statute of North Carolina provided a penalty on any common carrier for failure to deliver goods to consignee on arrival. It was contended that the statute could have no application to interstate traffic; but the court held that the statute merely enforced a common-law duty, which was in aid of, rather than an obstruction to, interstate commerce, and was valid. In the case of *Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, the United States Supreme Court held that an act of the Legislature, which merely imposed a penalty on a telegraph company for the violation of a duty which it owed by the general law of the land, was no regulation of, or obstruction to, interstate commerce, within the meaning of the federal Constitution. See, also, the cases of *Seaboard Air Line v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; *State v.*

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Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 966, 19 L. R. A. (N. S.) 93 and note; Morris v. Express Co., 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983; Bagg v. Railroad Co., 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569; Porter v. Charleston & S. R. Co., 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 671.

We have given to this case the most careful and protracted examination, and it is our view that the rule of the State Railroad Commission fixing reciprocal delayage rules is perfectly within their power. It imposes no additional duty on the carrier, but merely compels the fulfillment of a duty that is an incident to the contract of carriage. It is in aid of commerce, rather than an obstruction to it, and operates after the transportation is completed.

Affirmed.

STATE *ex rel.* RAILROAD COM'RS *v.* FLORIDA EAST COAST RY. CO.

(Supreme Court of Florida, June 29, 1909. Headnotes Filed and Rehearing Denied Oct. 12, 1909.)

[50 So. Rep. 425.]

Railroads—Orders of Railroad Commissioners—Duty to Obey.—

The valid administrative orders of the railroad commissioners should be obeyed, and those who are subject to such orders violate them at their peril.

Carriers—Orders of Railroad Commissioners—Application for Relief.—

In seeking relief from orders or rules of the railroad commissioners thought to be unduly burdensome or otherwise illegal, railroad companies should apply to the railroad commissioners for changes or modifications of such orders or rules.

Carriers — Orders of Railroad Commissioners — Arbitrariness. —

While the conduct of a railroad company in violating an order made by the railroad commissioners, without applying to the commissioners for a change or modification of the order, is emphatically disapproved by this court, yet if, under changed conditions, the order disobeyed would operate arbitrarily, and be detrimental to the public welfare, and violate constitutional rights of the carrier, the order will not be enforced.

Railroads—Regulation.—The initial discretion as to the means and manner of operating a railroad is in those charged with its management. It should be exercised in accordance with law, in good faith, and in the interest of the general welfare. Such discretion is subject to lawful governmental supervision and regulation, to prevent abuses, unjust discriminations, and other illegal actions or results.

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Railroads—Orders of Railroad Commissioners—Review.*—Rules and regulations adopted by the railroad commissioners for the lawful supervision and regulation of the service rendered by railroad companies are administrative in their nature, are presumed to be reasonable and just, and are subject to judicial review by appropriate proceedings.

Railroads—Regulation—Facilities for Making Connections Between Different Lines.†—The special and general statutory authority given the railroad commissioners to make and enforce reasonable and just regulations to require railroads to provide all necessary facilities and proper schedules to serve the uses, comfort, and convenience of the public, and to operate the roads for the public good, includes authority to make and enforce reasonable rules and regulations to require the furnishing of facilities for making connections between different roads for the use and convenience of the public.

Carriers—Duty to Furnish Adequate Facilities.—The duty of a railroad company to furnish reasonably adequate facilities is commensurate with the powers and privileges conferred upon the corporation and the just requirement of the public to be served by it. In determining the obligation of the corporation in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.

Railroads—Orders of Railroad Commissioners—Reasonableness.—All reasonable and just rules and regulations made by the railroad commissioners within the authority conferred upon them by law should be enforced to carry out the expressed purpose of the law in the interest of the general welfare; but unreasonable regulations are not within the authority conferred by law upon the railroad commissioners, and when regulations appear from the pleadings or the evidence in a case to be unreasonable and violative of constitutional provisions for the protection of private property rights, such unreasonable regulations will not be enforced by the courts.

Carriers—Orders of Railroad Commissioners—Enforcement.—Where it is in effect admitted by demurrer that the enforcement of an order of the railroad commissioners will be injurious to the public welfare and will violate constitutional rights of the carrier, the order will not be enforced, even though the carrier failed to apply to the railroad commissioners for relief from the order before disregarding it.

(Syllabus by the Court.)

*See last foot-note of *State v. Atlantic C. L. R. Co. (Fla.)*, 15 R. R. R. 286, 38 Am. & Eng. R. Cas., N. S., 286.

†For the authorities in this series on the subject of the powers of railroad commissions, see foot-note of *State v. Louisville & N. R. Co. (Fla.)*, 32 R. R. R. 432, 55 Am. & Eng. R. Cas., N. S., 432.

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In Banc. Original application for mandamus by the State, on relation of the Railroad Commissioners, against the Florida East Coast Railway Company. Demurrer to return overruled.

L. C. Massey, for relators.

Alex. St. Clair-Abrams, for respondent.

WHITFIELD, C. J. In a former opinion overruling a demurrer to the alternative writ herein it was held that the railroad commissioners had authority under the statutes of this state to make just and reasonable regulations of the schedules of railroads with reference to connections between different railroads, so as to afford reasonable convenience and comfort to the public affected by the service, and that all such regulations, when made, are by the statute declared to be *prima facie* reasonable and just. State v. Florida East Coast Railway Co., 57 Fla. —, 49 South. 43.

The respondent operates a railroad running north and south on the east coast of Florida, connecting at Jacksonville with several lines extending into other states and at its southern terminus with steamboats for points further south. The Atlantic Coast Line Railroad Company operates a line of railroad from the southwestern coast of Florida through the state and to points in other states to the north. The two systems are connected at points on the peninsula of the state by branch roads operated by the respondent. The order made by the railroad commission affects the schedules on the respondent's main line, as well as on its branches that connect with the Atlantic Coast Line road. The branch roads serve the local communities through which they run, as well as the business between the two different roads; and the rights of such local communities should be considered in connection with the rights of others of the public and of the respondent company in determining the reasonableness of schedules that necessarily affect them all.

A return to the alternative writ has been filed, and the relators have demurred to it. By this demurrer the relators admit the averments of the return, which in effect are that the respondent, in good faith and for the prompt dispatch and convenience of the great majority of its passengers, changed the schedule, as it believed it had the right to do, from the one ordered by the commissioners; that the schedule prescribed by the railroad commissioners was changed to properly serve business from its connecting lines at its terminals; that a change in circumstances affecting the bulk of its patrons necessitated the change made; that to operate the schedule as required by the railroad commissioners would delay and inconvenience daily from 2,000 passengers to over 2,500 passengers, for the benefit and convenience of an average of from 2 to 7 through passengers at one connection and from 13 to 22 through passengers at the other connection; that the schedule now in operation is to enable respond-

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ent to make connections for the great mass of its passengers on its entire system; that the passenger trains carry as express fruit and vegetables that require rapid transit and certain connection at its Jacksonville terminal with trains going north and west beyond the state; that in effect the schedule and connections ordered by the railroad commissioners would seriously inconvenience the greater portion of respondent's passengers and entail undue expense and risk; that to make the schedule required would necessitate more rapid speed than can safely be made while preserving necessary and proper service at respondent's terminal points for the great volume of its business; that the service afforded to the passengers at the two connecting points is ample and to make the change ordered would inconvenience the many to serve only a few; that special trains would be unreasonably expensive [and burdensome, because of conditions and for reasons stated; that for years past there had been a deficit between the earnings and expenditures of the respondent on its entire road; that owing to increased prices the deficit is steadily increasing, as shown by a statement given; that the cost of the extensions of its road by respondent is not considered in stating the deficits and burdens as set out in the return; that the enforcement of the schedule ordered by the railroad commissioners would be an unreasonable burden on the respondent in particulars stated in the return, without any compensating advantage to the great mass of its patrons, but, on the contrary, would be a serious detriment and loss to respondent and to the great body of its passengers and rapid freight under conditions and in the particulars stated in the return.

The return of the respondent also avers in effect that every economy is practiced in the purchase of property and in the employment of labor used in rendering the public service; that the obligations of the company bear only 5 per cent. interest; that the management and operation of the road are efficient, and all proper means are used to render an adequate service at the least cost, in order that the public may be properly served for the lowest charge.

It is urged by the relators that, as the railroad company has violated the order of the railroad commission in changing its schedule without application to or permission from the commission, the company cannot here assert a right to disregard the order of the commission, but must first present its case to the commission for its action thereon.

While the order violated is administrative, and not judicial, the railroad commissioners are entitled to have their orders obeyed, and the courts should recognize the obligation of railroad companies to accord proper respect to orders of the commission.

The initial discretion as to the means and manner of operat-

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ing a railroad is in those charged with the management, who should be skilled, experienced, competent, faithful, well-informed, and alert to secure safe and adequate service, and to avoid accidents, risks, losses, and injuries that would result from incompetent, unskillful, or unfaithful management. Such discretion should be exercised in accordance with law, in good faith, and in the interest of the public welfare, and is subject to lawful governmental supervision and regulation to prevent abuses, unjust discriminations, and other illegal actions or results. Rules and regulations adopted by the commissioners within their authority are presumed to be reasonable and just, and are subject to review as administrative matters, not by appeal or writ of error to correct mere errors or irregularities, but in mandamus and other appropriate proceedings to test the legality of the rule and regulations, when it is sought to enforce or to enjoin such rules and regulations. It is the duty of railroad corporations to obey the lawful orders, rules, and regulations promulgated by competent state authority, and they violate such orders at their peril. In seeking relief from orders or rules thought to be unduly burdensome or otherwise illegal, the corporation should apply to the railroad commissioners for changes or modifications before resorting to the courts; and valid orders or rules of the commission should not be disregarded with impunity or without valid excuse.

While the conduct of the respondent in disregarding the commission is emphatically disapproved, yet if, under the changed conditions alleged, the order of the commission will operate arbitrarily, as would seem to be indicated by the averments of the return, that are admitted by the relators through the demurrer, it would be unjust to respondent and to the great body of its patrons to enforce the order of the commission. The order, viewed in the light of the facts admitted, is apparently not a reasonable and just regulation; but it appears to be an arbitrary and unlawful order that, if enforced, will operate to the detriment of most of the respondent's patrons, and to deprive the respondent of its property without due process of law, and to deny the respondent the equal protection of the laws.

The special and general statutory authority given the railroad commissioners to make and enforce reasonable and just regulations to require railroads to provide all necessary facilities and proper schedules to serve the uses, comfort, and convenience of the public, and to operate the roads for the public good within the statutory authority, includes authority to make and enforce reasonable rules and regulations to require the furnishing of facilities for making connections between different roads for the use and convenience of the public.

Where a railroad, though wholly within a state, must, in order to properly serve the greater portion of its patrons, so schedule its through trains, carrying passengers, mail, and perishable

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freight, as to make prompt and regular connections at its terminal points with other lines of transportation extending into densely populated sections, in determining the reasonableness of a governmental relation affecting the schedules to be observed by such through trains, consideration should be given to the character and volume of the business requiring the terminal connections, the connections at the terminal points reasonably require to serve the through business, the volume of business demanding intermediate connections, the burdens and risks to be cast upon the carrier and the general public in making the intermediate connections, the benefits to be derived by the public and the carrier from the side connections, as well as other matters affecting the substantial rights of the local and general public and the carriers.

If the through trains, in view of the volume and character of respondent's through business or other considerations, cannot reasonably be required to make the desired intermediate connections, the railroad may be required to run special trains to serve the public at intermediate points or in local or lateral communities, where the business warrants it and no unjust burden is thereby put upon the carrier with reference to its entire business.

The duty of a railroad company to furnish reasonably adequate facilities is commensurate with the powers and privileges conferred upon the corporation and the just requirement of the public to be served by it. In determining the obligation of the corporation in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.

All reasonable and just rules and regulations made by the railroad commissioners within the authority conferred upon them by law should be enforced to carry out the expressed purposes of the law in the interest of the general welfare; but unreasonable regulations are not within the authority conferred by law upon the railroad commissioners, and when regulations appear from the pleadings or the evidence in a case to be unreasonable and violative of constitutional provisions for the protection of private property rights, such unreasonable regulations will not be enforced by the courts.

Whether exercised and performed directly or through the medium of administrative officers, the power and duty of the Legislature are to supervise and regulate within legal bounds the rendering of service of a public nature, and not to arbitrarily control and manage the business or property of those engaged in rendering the public service. Property of individuals or corporations used in rendering a public service is private property. Its use is subject to lawful and reasonable regulation in the interest

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of the public welfare, to the end that there be no abuses or unjust discriminations or excessive charges in rendering the public service. Those engaged in a public service may properly exercise lawful and reasonable discretion in the physical control and management of property used in performing the service and in the conduct of the business, and so long as the discretion is exercised in accordance with law, in good faith, and with proper regard for the public welfare it should not be interfered with, though such discretion is at all times subject to governmental supervision and regulation within legal limitations, to prevent its being exercised so as to result in abuses or unjust discriminations or other illegalities in rendering the public service. Lawful regulation in the interest of the public welfare, not arbitrary control, is the extent of the governmental authority. While the authority to regulate extends to all the means used in rendering the service, such authority should be confined to lawful regulation; and arbitrary control or management should not be attempted or permitted under the guise of regulation and supervision.

The defense presented by the return of the respondent is not that the enforcement of the order of the railroad commissioners will cause a particular loss or burden to respondent, that will only prevent it from realizing a profit, or will reduce its profits upon its business as an entirety; but it is in effect averred in the return and admitted by the demurrer that the enforcement of the order will greatly inconvenience many patrons to serve only a few, will seriously affect injuriously the greater part of respondent's service to the general public, will require respondent to assume undue risks or unreasonable burdens, which risks will operate to the disadvantage of the great mass of respondent's patrons, for the benefit of only a few, and will cause unreasonable loss and risks to respondent beyond its duty to the public, by increasing the annual loss sustained in the operation of the road as an entirety, and consequently that the order is unreasonable and unlawful.

The enforcement of an unreasonable and unlawful regulation is in effect a taking of property without due process of law and a denial of the equal protection of the laws.

In rendering the public service, the respondent and its property rights are subject to reasonable and lawful supervision and regulation and to the burden incident thereto; but the respondent and its property are not subject to unjust or unreasonable orders or regulations, the enforcement of which will not be for the general welfare, but will violate the constitutional provisions designed for the protection of all property rights, whether used in the public service or not.

The demurrer to the return is overruled, with leave to present issues of fact within two weeks. All concur.

ST. LOUIS & S. F. RY. CO. *v.* STATE *et al.*

(Supreme Court of Oklahoma, Oct. 7, 1909.)

[105 Pac. Rep. 351.]

Carriers — Regulation by Corporation Commission — Review by Courts.*—An appeal will lie to the Supreme Court of the state from the action of the Corporation Commission prescribing rates, charges, or classifications of traffic or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon, or an increase thereof.

Railroads — Regulation by Corporation Commission — Review by Courts.*—An appeal will not lie to the Supreme Court of the state to review the action of the Corporation Commission in requiring all railroad companies and street car companies operating within the state, upon the happening of an accident, to send report thereof, both by telegraph and mail, to the Corporation Commission at its office in Guthrie.

(Syllabus by the Court.)

Appeal from Corporation Commission.

From the action of the State Corporation Commission requiring railroad and street railway companies, upon the happening of an accident, to send a report thereof, both by telegram and letter, to the Corporation Commission, the St. Louis & San Francisco Railway Company appeals. Appeal dismissed.

See, also, 104 Pac. 1087, 1088.

W. F. Evans, R. A. Kleinschmidt, and Dale & Bierer, for appellant.

G. A. Henshaw, Asst. Atty. Gen., for the State.

WILLIAMS, J. The appellees, through their attorney, move to dismiss this appeal on the ground that the court has not jurisdiction thereof. The only authority that this court has to entertain an appeal from the Corporation Commission is by virtue of section 20, art. 9 (section 231, Bunn's Ed.) of the Constitution, which provides that: "From any action of the commission prescribing rates, charges, or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusing to approve a

*For the authorities in this series on the subject of review by courts of the proceeding of railroad commissions, see last foot-note of *State v. Atlantic C. L. R. Co. (Fla.)*, 15 R. R. R. 286, 38 Am. & Eng. R. Cas., N. S., 286, where all those preceding it are collected.

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suspending bond, or requiring additional security thereon or an increase thereof, as hereinafter provided for, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provision as to cost, as may be prescribed by law) may be taken by the corporation whose rates, charges or classifications of traffic, schedule, facilities, conveniences, or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the state."

This appeal does not come within the terms of the foregoing, and the same is dismissed.

KANE, C. J., and DUNN, HAYES, and TURNER, JJ., concur.

THWEAT v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Feb. 23, 1910.)

[67 S. E. Rep. 15.]

Constitutional Law—Due Process of Law—Regulation of Railroads.*—Act March 25, 1904 (24 St. at Large, p. 671), imposing a penalty on railroad companies for delay in transporting freight, does not contravene Const. U. S. Amend. 14, § 1, prohibiting states from making any law abridging the privileges or immunities of citizens, or depriving any person of property without due process of law, or denying the equal protection of the law.

Carriers—Statutory Regulations—Penalties—Delay in Transportation—Constitutionality.*—Act March 25, 1904 (24 St. at Large, p. 671), imposing a penalty on railroad companies for delay in transporting freight, is not unconstitutional as contrary to public policy on the grounds that it promotes dishonesty.

Appeal from Common Pleas Circuit Court of Berkeley County;
R. C. Watts, Judge.

Action by W. D. Thweat against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Octavius Cohen, for appellant.

John O. Edwards, for respondent.

*For the authorities in this series on the constitutionality of statutes prescribing penalties to compel carriers to perform their duties, etc., see foot-note of *St. Louis, etc., Ry. Co. v. Wynne* (Ark.), 33 R. R. R. 459, 56 Am. & Eng. R. Cas., N. S., 459; first foot-note of *Southern Ry. Co. v. State* (Miss.), 33 R. R. R. 52, 56 Am. & Eng. R. Cas., N. S., 52; foot-note of *Caughman v. Columbia, etc., R. Co.* (S. Car.), 32 R. R. R. 272, 55 Am. & Eng. R. Cas., N. S., 272.

Brown & Brown Coal Co. v. Grand Trunk Ry. Co

JONES, C. J. Plaintiff recovered judgment in the magistrate's court against defendant for \$70.24 penalties for the delay in the transportation of fertilizers from Charleston, S. C., to Bonneau, S. C., as provided in the penalty statute. 24 St. at Large, p. 671. On appeal to the circuit court the judgment was affirmed.

The main question raised in this appeal is whether the said penalty statute violates section 1 of the fourteenth amendment of the federal Constitution. This question has been repeatedly ruled against appellant's contention. *Sanford v. Seaboard Air Line Railroad*, 79 S. C. 519, 61 S. E. 74; *McCutchen v. Atlantic Coast Line*, 81 S. C. 71, 61 S. E. 1108; *Farrell v. Railroad Co.*, 82 S. C. 414, 64 S. E. 226.

The contention that the statute is unconstitutional because contrary to public policy, in that it puts a premium upon dishonesty, is without merit. The design of the statute is to effectuate an important public purpose in compelling railroads as carriers of freight to perform the duty which they owe to the public to transport and deliver freight within a reasonable time. *McCutchen v. Railroad Co.*, *supra*.

The judgment of the circuit court is affirmed.

BROWN & BROWN COAL CO. v. GRAND TRUNK RY. CO.

(Supreme Court of Michigan, Feb. 3, 1910.)

[124 N. W. Rep. 528.]

Carriers—Discrimination—Prepayment of Freight Charges.—Plaintiff, a shipper, upon a showing that a carrier had a credit list consisting of certain customers, some of whom were competitors of plaintiff, for which it carried goods without requiring a prepayment of freight and that it had accorded this privilege to plaintiff over a year, was not entitled to compel the carrier to haul his goods without prepayment of freight on the ground that refusal to do so constituted discrimination.

Carriers—Carriage of Goods—Discrimination.—The act of a carrier in hauling goods for some shippers without prepayment of freight, and not for others engaged in the same business, does not constitute a violation of Laws 1907, No. 312, § 17, making it unlawful for a common carrier to give any preference to any shipper or subject him to any undue or unreasonable disadvantage or prejudice.

Certiorari to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Mandamus, on the relation of the Brown & Brown Coal Company, against the Grand Trunk Railway Company to compel re-

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spondent to forward relator's goods without prepayment of freight. From an order denying the writ, relator brings certiorari. Affirmed and writ dismissed.

Argued before MONTGOMERY, C. J., and OSTRANDER, BLAIR, STONE, and HOOKER, JJ.

E. T. Berger, for relator.

L. C. Stanley, for respondent.

BLAIR, J. On or about October 22, 1908, the defendant railroad company delivered to the siding of the relator eight cars of sand, upon all of which cars certain freight charges were due and payable at the time of delivery. On the same day as delivery, the relator directed the railroad company to deliver three of said cars to the Fairview Coal & Supply Company of Detroit, with freight charges to follow, and deliver five of said cars to the People's Ice Company of Detroit, with charges to follow. In directing charges to follow it was understood that same were collectible from the parties to whom the cars were directed to be forwarded. It is admitted by the railroad company that cars were so delivered and orders were received for forwarding as above stated. The defendant railroad company refuses to forward the cars until the charges thereon had been paid by the relator, and refused to undertake to move the cars to and collect the charges thereon from the parties to whom they were directed to be forwarded. On October 28, 1908, a car loaded with gravel was delivered to the relator's siding, and on the same day it directed the railroad company to deliver same to Schillinger Brothers of Detroit, with freight charges to follow. The railroad company refused to move the car until the charges were paid by the relator. The relator claims in this case that it had until the month of August, 1908, been doing business with the railroad company under its usual custom of forwarding cars to its purchasers with all charges to follow, and that this custom had been in full force and effect ever since it was in the sand and gravel business, and that because of a dispute with the railroad company over car measurements in another and different matter the railroad company, as a retaliatory measure, refused to move the cars in question in this case until the relator had advanced freight charges thereon. The relator further claims that other dealers in sand and gravel in the city of Detroit doing business with the defendant railroad company are accorded the privilege of forwarding materials in car lots to their customers with freight charges to follow and paid by the parties to whom they were to be forwarded. The relator claims that this is the way they do business, and the terms upon which the materials are sold include the payment by the purchaser of the freight charges, and that by reason of the arbitrary action of the de-

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fendant railroad company in suddenly refusing to continue its custom the relator company was put to a serious disadvantage with its competitors.

Jacob G. Brown, relator's assistant manager, testified: "The Grand Trunk System maintains what is known as a 'credit list,' which is an accommodation extended to different concerns for their convenience, giving them the privilege of ordering their shipments to different yards, etc. When the cars are delivered, the bills are sent and they are paid. It is conducted just like a general book account. Our request was, of course, on the condition that those consignees were upon the credit list of the Grand Trunk. If the parties to whom we directed shipment were not on their credit list, we were willing to prepay the freight. We have done this before. Some time in the spring last year we had a disagreement with the Grand Trunk Railway Company with reference to charges. We disputed their measurements of certain cars upon which the charges are based. The discrepancies were so great that we refused to pay the charges, and asked them to correct the bill, and they refused to do that. There were some 88 bills unpaid for that reason, and that resulted in their canceling our credit and at the same time refuse to move any cars. The dispute was finally settled, but our credit was not restored, although they stated that their reason was not because of any lack of financial standing. Prior to this dispute we had forwarded cars over the Grand Trunk with charges to follow without objection. Q. After this dispute and the settlement of it, did they consent to move cars and have charges to follow? A. No; they have refused to do so. The matter of reconsignment of cars with charges to follow has never been in dispute before; the previous trouble being for the reason stated. We have competitors along the line of the Grand Trunk Railway. We have purchased material from other concerns along the Grand Trunk last year and have ourselves paid the charges on the reconsignment of these cars to us without objection by the railroad company prior to our dispute with them. Our purpose in not prepaying charges and to have them follow the cars to their final buyer is because our sand is sold on pit measurement or railroad measurement, and the customers when they settle for the shipment want to see the freight bills before paying to see if they correspond with the pit measurement. We are always responsible for the freight until it is paid by the consignee, but there are about 16 cars that we ordered forwarded that were not delivered, all of them being rejected by the railroad company. Because of the failure of the railroad company to move the cars on our order the orders were canceled."

Respondent's local freight agent testified: "There were 22 cars that were held up in the latter part of August, or the first part of September, caused by our canceling their credit on ac-

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count of their delay in settling charges on previous cars. These charges had remained undisposed of for some days. Finally, they paid our charges as rendered except on three cars, making a difference in the charges of about \$1. Those cars were standing there all the time until they paid, so that they had opportunities to remeasure them. As far as my knowledge goes, I have had more trouble with them than with any other firm in settling charges. There was \$600 of freight money outstanding and in dispute in October."

Relator prays for the writ of mandamus commanding the respondent to move the cars refused and all cars in the future, with charges to follow, so long as such privilege is extended to relator's competitors. Relator relies upon the custom shown as bringing it within the rule of *Gates v. Detroit & Mackinac Ry. Co.*, 151 Mich. 548, 115 N. W. 420, and upon section 17, Act 312, Pub. Acts 1907. In the *Gates Case* the contract between the parties was alleged to have been made with reference to the custom then existing between the parties to deliver complainant's logs on defendant's side track in Bay City for transportation to complainant's mill on the Michigan Central. The circuit judge granted the preliminary injunction prayed for, commanding the defendant to deliver cars at the customary place until the further order of the court. Defendant appealed, and, in view of the custom, the temporary inconvenience to defendant and the serious injury to complainant of a contrary holding, this court, for the purpose of maintaining the *status quo* until the final hearing, sustained the trial court.

In the present case the alleged custom, so far as relator was concerned, had only existed from May, 1907, to August, 1908. It did not apply as to all dealers, but only to those who were placed by defendant upon its credit list, and such place did not depend upon contract or other legal right but upon the grace of the defendant. At least, the defendant was entitled to determine for itself to whom it would extend credit, and, having had serious trouble with relator in collecting its freight charges, we cannot say that it was not justified in striking its name from its credit list. The case is clearly distinguishable from *Gates v. D. & M. Ry. Co.*, *supra*. Section 17, Act No. 312, Sess. Laws 1907, provides that: "It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation," etc., or subject them "to any undue or unreasonable disadvantage or prejudice in any respect whatsoever." We do not think that the acts complained of give an undue or unreasonable preference or advantage to relator's competitors or subject relator to an undue or unreasonable disadvantage or prejudice within the meaning of said section 17. *Hutchinson on Carriers* (3d Ed.) §§ 567, 799, and cases cited

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in notes; *Little Rock & M. R. Co. v. St. Louis, etc., Ry. Co.*, 11 C. C. A. 417, 26 L. R. A. 192; *Randall v. Railroad*, 108 N. C. 612, 13 S. E. 137.

The order of the circuit court is affirmed, and the writ is dismissed.

MISSOURI PAC. RY. CO. v. CASTLE.

(Circuit Court of Appeals, Eighth Circuit, August 9, 1909.)

[172 Fed. Rep. 841.]

Commerce—Interstate Railroads—Fellow Servants—State Statutes Limiting Doctrine.—Laws Neb. 1907, p. 191, c. 48, § 1, which provides, inter alia, that railroad companies operating trains within the state shall be liable for injuries to employees resulting from the negligence of other employees, is comprehensive in its terms, and applies to railroads doing an interstate business, and governs the liability of such companies to employees operating trains engaged in interstate commerce in the absence of valid legislation by Congress covering such liability.

Constitutional Law—Equal Protection of Laws—Statutes Establishing Doctrine of Comparative Negligence in Actions against Railroads.*—Laws Neb. 1907, p. 192, c. 48, § 2, which provides for the application of the rule of comparative negligence in actions by employees against railroad companies for personal injuries, and also that "all questions of negligence and contributory negligence shall be for the jury," is within the constitutional power of the Legislature, and does not deprive the defendant in such cases of the equal protection of the laws.

Trial—Reception of Evidence—Offer.—Under the rule of the federal courts, an offer to prove certain facts may be made without first propounding a question to a witness as a basis for such offer, and, if the offer is rejected, error may be assigned thereon where there is nothing to indicate that the offer was not made in good faith, or that the proof would not have been produced if permitted.

Witnesses — Competency — Privileged Communications.—Where plaintiff's leg was crushed by being run over by a car of one of defendant's railroad trains, which facts were known and not in dispute, a statement made by plaintiff to defendant's physician who came to treat his injury as to the manner in which his foot came to be caught under the wheel was not a privileged communication within Civ. Code Neb. § 333 (Comp. St. Neb. 1901, § 5907), which prohibits

*See second foot-note of *Hoxie v. New York, etc., R. Co.* (Conn.), 33 R. R. R. 537, 56 Am. & Eng. R. Cas., N. S., 537; foot-note of *St. Louis, etc., R. Co. v. McNamare* (Ark.), 33 R. R. R. 713, 56 Am. & Eng. R. Cas., N. S., 713.

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a physician from disclosing "any confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office," having no relation to the treatment of the injury, and the exclusion of such statement when offered in evidence was error.

In Error to the Circuit Court of the United States for the District of Nebraska.

James W. Orr (*George G. Orr* and *B. P. Waggener*, on the brief), for plaintiff in error.

T. J. Mahoney (*J. A. C. Kennedy*, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

CARLAND, District Judge. Ozro Castle brought this suit against the Missouri Pacific Railway Company to recover damages for personal injuries received by him on October 2, 1907, while in the employ of the company at Auburn, Neb. It is alleged in the petition that said injuries resulted from the negligence of fellow servants. The plaintiff recovered a verdict, and the defendant has removed the case to this court by writ of error. It appeared at the trial that the train upon which plaintiff was employed at the time he was injured started October 1, 1907, from St. Joseph, Mo., for Auburn, Neb., via Atchison, Kan., and was engaged in interstate commerce. Plaintiff based his cause of action upon section 1, c. 48, p. 191, Laws Neb. 1907, which was in force on the date of the injury. Said section reads as follows:

"Section 1 (Railway Company's Liability to injured employee). That every railway company operating a railway engine, car, or train, in the state of Nebraska, shall be liable to any of its employees who at the time of the injury are engaged in construction or repair work, or in the use and operation of any engine, car, or train, for said company, or, in case of his death to his personal representatives for the benefit of his widow and children, if any, if none, then to his parents, if none, then to his next of kin dependent upon him, for all damages which may result from negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, ways or works."

It is contended that said section does not include a railway company engaged in interstate commerce in the state of Nebraska, but the language of the section clearly includes all railroads operated in the state. It is also contended that the section above quoted is inoperative so far as employees of the defendant en-

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gaged in interstate commerce are concerned by reason of the act of Congress approved June 11, 1906 (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]). As this last named act was declared to be unconstitutional in *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, it must be considered as never having existed for any purpose. Therefore Congress had not legislated upon the subject contained in section 1 of the Nebraska law above quoted at the time that plaintiff received his injuries. In the absence of legislation by Congress, it was competent for the state to legislate. *Chicago, Milwaukee, etc., Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688.

It is further contended that section 2, c. 48, p. 192, Laws Neb. 1907, is repugnant to article 14 of the amendments to the Constitution of the United States, in that it abridges the privileges and immunities of a citizen of the United States, deprives the defendant company of its property without due process of law, and denies to it the equal protection of the laws. The section referred to reads as follows:

"Sec. 2 (Same; contributory negligence). That in all actions hereafter brought against any railway company to recover damages for personal injuries to any employee or when such injuries have resulted in his death, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery when his contributory negligence was slight and that of the employer was gross in comparison but damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, all questions of negligence and contributory negligence shall be for the jury."

Conceding but not deciding that said section would be binding upon the federal courts sitting in Nebraska, it has no such effect as is claimed by defendant. In view of the history of trial by jury and the distribution of governmental powers by the Constitution of Nebraska, we cannot presume for a moment that the Legislature had reference to any questions except those of fact, when it used the language: "All questions of negligence and contributory negligence shall be for the jury." As thus interpreted the language quoted is simply declaratory of existing law. *Kiley v. Chicago, M. & St. P. Ry. Co.* (Wis. 1909) 119 N. W. 309.

It is only when in the opinion of the court there is no question of negligence or contributory negligence as a matter of fact that cases are taken from the jury, under existing practice. In so far as the statute creates the rule of comparative negligence, it in no wise tends to destroy any of the constitutional rights of defendant. The rule of comparative negligence was adopted by some courts of their own motion, and not until it was demonstrated that the rule is impracticable in cases tried to a jury

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was it discarded, as in theory it is a just rule and is continually enforced by the courts of admiralty, where the trained minds of judges are able to compare the faults of vessels in collision. It is not a question here, however, whether the rule ought to be adopted, but whether the Legislature of Nebraska had the power so to do. Of this we have no question. If the Legislature has the power to take away the defense that the injury sued for was committed by fellow servants, it certainly has the right to modify the rule that any negligence of a plaintiff directly contributing to his injury will defeat his recovery. *Missouri Pacific Railway Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minneapolis & St. Louis Railway Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Tullis v. Railway Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; *Kiley v. Chicago, M. & St. P. Railway Co. (Wis.)* 119 N. W. 309.

As the statute only acts prospectively, defendant cannot say that it takes away any vested right. The importance of the question as to whether section 2, above quoted, is binding upon the federal courts sitting in Nebraska, so far as the rule of comparative negligence is concerned, is largely minimized by section 2 of the act of Congress approved April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65), which establishes practically the same rule. At the trial the defendant called as a witness in its own behalf, Dr. W. H. Ramsey, who being examined in chief testified as follows:

"Q. What is your full name? A. W. H. Ramsey.

"Q. What is your profession? A. Physician and surgeon.

"Q. What position, if any, do you hold with the Missouri Pacific Railway Company? A. I am one of the surgeons.

"Q. Did you hold the same position in October of last year? A. Yes, sir.

"Q. Do you remember of an accident happening to Mr. Castle, the plaintiff in this case? A. Yes, sir.

"Q. Did you examine his injury? A. Yes, sir.

"Q. Describe to the jury in what manner he was injured.

"Mr. Mahoney: Before that question is answered, if your honor please, I desire to ask the witness a question or two in respect to his relation to the case, bearing upon his competency.

"By Mr. Mahoney:

"Q. Doctor, where did you examine him? A. At the hospital.

"Q. In Omaha? A. Yes, sir.

"Q. Did you treat him? A. He arrived in the evening, and, no; I hadn't treated him before that.

"Q. But did you examine him for the purpose of treating him? A. Yes, sir.

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"Q. What examination you made was for that purpose? A. Yes, sir.

"Q. The examination you made was for the purpose of diagnosing the case to become informed so you could properly treat him? A. Yes, sir.

"Q. In the discharge of your duties as a surgeon? A. Yes, sir."

Upon objection of Mr. Mahoney, the above question and an offer made thereon was excluded, and, without asking any other question, counsel for defendant then made the following offer:

"Defendant also offers to prove by this witness that he had a conversation with the plaintiff in which the plaintiff told him that the injury was sustained by plaintiff by having his foot slip off the brakebeam and on to the 'T' rail of the track and one of the car wheels of the first car passing over his foot.

"Mr. Mahoney: That is objected to for the reason that it is incompetent, and for the reason that the witness is incompetent to testify respecting the information acquired by him under the circumstances which he has disclosed, such testimony being forbidden by statute, and the witness being made incompetent to testify thereto, for the further reason that there has been no foundation laid for the making of such an offer."

This objection was sustained by the court and the ruling excepted to by counsel for defendant. It is claimed that no error can be assigned here upon the above ruling of the court for the reason that no question was propounded by counsel upon which to base the offer and cases are cited in support of this contention, but we think the rule established in the federal courts is as stated by Chief Justice Waite in *Scotland County v. Hill*, 112 U. S. 186, 5 Sup. Ct. 95, 28 L. Ed. 692, as follows:

"It is claimed, however, that error cannot be assigned here on the exception to the exclusion of the oral proof, because the record does not show that any witness was actually called to the stand to give the evidence, or that any one was present who could be called for that purpose, if the court had decided in favor of admitting it, and we are referred to the cases of *Robinson v. State*, 1 Lea (Tenn.) 673, and *Eschbach v. Hurtt*, 47 Md. 61, 66, in support of that proposition. Those cases do undoubtedly hold that error cannot be assigned on such a ruling unless it appears that the offer was made in good faith, and this is in reality all they do decide. If the trial court has doubts about the good faith of an offer of testimony, it can insist on the production of the witness, and upon some attempt to make the proof before it rejects the offer; but, if it does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly."

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Under the above rule we must treat the offer as made in good faith, and presume that the testimony offered would have been produced if counsel had been permitted to do so. Whether or not counsel for defendant ought to have been permitted to show the facts contained in his offer depends upon the true construction of section 333 of the Civil Code of Nebraska, which is as follows:

"No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline."

The above section of the Civil Code of Nebraska was before this court in the case of *Union Pacific Railway Co. v. Thomas*, 152 Fed. 365, 81 C. C. A. 491. It was there said:

"The essential elements of a privileged or a confidential communication under the Nebraska statute are: (1) The relation of physician and patient; (2) information acquired during this relation; and (3) the necessity and propriety of the information to enable the physician to treat the patient skillfully in his professional capacity."

While the offer itself does not disclose that the statement was made to the witness under the same circumstances as the information sought by the previous question and offer which were excluded, in fairness, it will be so treated. The question then is narrowed down to this. Was the fact that plaintiff told the witness that he was injured by having his foot slip off the brake beam onto the "T" rail of the track and one of the car wheels of the first car passing over his foot a confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

It is obvious that the admissibility of evidence sought to be excluded under the statute, above quoted, must be determined by the facts in each case. In the *Thomas Case* above referred to the injuries were internal. From what particular disease the plaintiff was suffering, and what was the proximate cause thereof, was in doubt. Under such a state of facts answers to questions as to how the plaintiff was injured, and as to what physical injuries she received were clearly necessary to enable the physician to prescribe and hence, were privileged. In the case at bar there was beyond question a crushed right leg about four inches above the ankle. The injury beyond question was caused by one of the defendant's cars passing over plaintiff's leg. Whether the injury was caused by plaintiff's or defendant's negligence

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was the pivotal question in the case. It is impossible to imagine anything that Castle, the injured person, could say to the physician in reference to the cause of the injury that would in any way throw any light upon the manner of treating the same. How the leg came to be crushed was for the purpose of treatment absolutely immaterial. What plaintiff told the witness was of no assistance whatever to enable him to discharge the functions of his office.

The statute is in derogation of the common law, and often excludes the best evidence. It should not, therefore, be extended to matters of evidence not coming clearly within its provisions as the object and purpose of all trials is the development of the true facts in each case. We find no cases which under similar circumstances have held testimony such as was offered in the present case inadmissible, but, on the contrary, we find the following decisions which hold such evidence to be admissible under similar or like statutes. *Smith v. John L. Roper Lumber Co.*, 147 N. C. 62, 60 S. E. 717, 125 Am. St. Rep. 535; *Linz v. Mass. Mut. Life Ins. Co.*, 8 Mo. App. 365; *Green v. Terminal Railroad Association*, 211 Mo. 18, 109 S. W. 715; *Griebel v. Brooklyn Heights Railroad Co.*, 68 App. Div. 204, 74 N. Y. Supp. 126; *Travis v. Hahn*, 119 App. Div. 138, 103 N. Y. Supp. 973; *Brown v. Rome, W. & O. R. Co.*, 45 Hun (N. Y.) 439; *De Jong v. Erie Railroad Co.*, 43 App. Div. 427, 60 N. Y. Supp. 125; *Kansas City, Fort Scott & Memphis Railway v. Murray*, 55 Kan. 336, 40 Pac. 646; *Collins v. Mack*, 31 Ark. 684; *Griffiths v. Metropolitan St. Railway Co.*, 171 N. Y. 106, 63 N. E. 808; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433.

We think the court erred in sustaining the objection to the testimony offered, and for such error we reverse the judgment and grant a new trial; and it is so ordered.

STATE *v.* ST. LOUIS & S. F. R. Co.

(Supreme Court of Arkansas, Nov. 1, 1909.)

[122 S. W. Rep. 627.]

Railroads—Passenger Accommodations—Waiting Rooms—Drinking Water—Indictment.—An indictment that defendant, a railroad corporation, maintaining a station with waiting rooms for passengers at B., unlawfully failed to supply such waiting rooms with wholesome drinking water, and refused to provide and keep provided and supplied such waiting rooms with any drinking water whatever, stated a violation of Kirby's Dig. § 6634, requiring all persons operating railroads within the state to keep waiting rooms at all times supplied with wholesome drinking water, etc.

Railroads—Station Regulations—Drinking Water—Statutes—Construction.—Kirby's Dig. § 6634, requires all railroads to keep waiting rooms supplied with drinking water, and section 6636 declares that railway companies neglecting to comply shall be guilty of a misdemeanor, and, on conviction, shall be fined for each day's failure, and that any agent of the railway company at such depot neglecting to comply shall on conviction be fined. Held, that the statute expressly makes both the railroad and the particular agent guilty of a misdemeanor and subject to a fine for failure to comply with section 6634; the duties imposed thereby not being entirely personal with the agent.

Constitutional Law—Equal Protection of the Laws—Station Regulations—Penalty.—Kirby's Dig. §§ 6634, 6636, imposing a penalty on railroad companies and their station agents for failure to provide waiting rooms with wholesome drinking water, and fixing a more onerous penalty for violation on the corporation than on the agent, was not for that reason unconstitutional as depriving the railroad companies of the equal protection of the laws.

Appeal and Error—Writ of Error—Time—Statutes.—Act May 5, 1909, prescribing the time within which a writ of error may be sued out, does not apply to writs to review judgments rendered prior to its enactment.

Appeal from Circuit Court, Lawrence County; Charles Coffin, Judge.

The St. Louis & San Francisco Railroad Company was indicted for failure to provide drinking water in its station, and, from an order sustaining a demurrer to the indictment, the state appeals. Reversed and remanded.

Hal. L. Norwood, Atty. Gen., and *C. A. Cunningham*, Asst. Atty. Gen., for the State.

W. F. Evans and *W. J. Orr*, for appellee.

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McCULLOCH, C. J. The grand jury of the Western district of Lawrence county returned against appellee the following indictment (omitting caption): "On the 13th day of August, 1908, the St. Louis & San Francisco Railroad Company, being a railroad corporation, operating a line of railroad in this state, said company operating a line of railroad in and through the Western district of said county, and passing through and by the town of Black Rock, in said district and county, and said company then and there having and maintaining a station and depot at said place of Black Rock, and maintaining and having waiting rooms for passengers at said station and depot, and a waiting room for persons of the white race being situated in the said depot building near the ticket office of said defendant company, and being then and there used by the defendant company as a waiting room for white passengers, and such passengers being then and there in said waiting room, the said defendant, the St. Louis & San Francisco Railroad Company, in said county, district, and state, did then and there unlawfully fail, neglect, and refuse to supply said waiting room with wholesome drinking water, and did then and there fail, neglect, and refuse to provide and supply, and to have and keep provided and supplied said waiting room with any drinking water whatever, against the peace and dignity of the state of Arkansas."

The court sustained a demurrer on the following grounds:

"(1) That said indictment does not charge any offense under the laws of the state of Arkansas against this defendant.

"(2) That the acts complained of are acts personal to the agent, and not to this defendant, and the duties herein imposed rest upon the said agent, and not upon this defendant."

It will be seen that the indictment charges appellee, a railroad corporation, with having refused and neglected to supply with drinking water one of the waiting rooms in the station at Black Rock, Ark. The indictment follows closely the language of the statute, and we think that it fully states facts constituting a violation of the statute, which reads as follows: "All persons who own or operate any line or lines of railroad in this state shall keep separate waiting rooms now provided for in section 6622 in all depot buildings now erected or that may hereafter be erected, for the accommodation of their passengers, open both day and night for the free and unrestricted use of their said passengers. And that said waiting rooms shall at all proper times and seasons be comfortably heated and at all times supplied with wholesome drinking water, and shall in all other respects be kept and maintained in a sanitary and clean manner." Section 6634, Kirby's Dig.

The second ground of the demurrer is equally untenable. The statute in exopress terms makes both the railway company and the particular agent who neglects or refuses to perform the re-

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quired acts guilty of a misdemeanor, and subject to a fine. A railroad corporation can act only through agents, and it is within the power of the Legislature to inflict penalties upon corporations for the conduct of their agents in failing to perform statutory duties. In *State v. St. L. & S. F. R. R. Co.*, 83 Ark. 254, 103 S. W. 625, this court held that the statute in question is not violative of the fourteenth amendment to the Constitution of the United States. It is now pointed out by counsel for appellee in their brief that the court in the opinion in that case did not state the reasons for the decision, and they insist that the reasons must have been that the court deemed that part of the statute which requires that waiting rooms be comfortably heated, and at all times supplied with drinking water, to be applicable only to the particular agent of the railway company who fails to comply with its provisions. Such a conclusion cannot be drawn from the opinion in that case, for it involves an indictment against the company itself for failure to keep the waiting room comfortably heated and supplied with drinking water. The court decided that the indictment was void for uncertainty and duplicity, but that the statute was valid in its application to railroad corporations for failure to perform the specified acts. That is the only reasonable conclusion to be drawn from the decision.

It is argued that, if these provisions of the statute be construed to apply both to the railroad corporation and the particular agent who is guilty of the negligent omission, it is void on the ground of its discriminatory effect in imposing a larger fine upon the railroad corporation than upon the offending agent. It does not at all follow that this is an improper discrimination. The aim of the statute is to punish both the principal and the agent, visiting the greater punishment upon the principal. We are clearly of the opinion that this is permissible, and that it does not constitute an unjust and unreasonable discrimination. The two classes of offenders occupy different attitudes. It is within the province of the lawmakers to determine which class shall suffer the greater punishment. In other words, neither the railroad corporation nor any other class of employers is denied the equal protection of the laws by a statute inflicting a severer punishment upon the principal than upon the agent. In *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578, Mr. Justice Field, delivering the opinion of the court, said: "The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." And in *Pembina Mining Co. v. Pennsylvania*,

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125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650, the same learned judge said: "The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation." Mr. Justice Bradley, in *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, in referring to this provision of the fourteenth amendment, said: "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in the same class or under like circumstances."

Counsel insist that the writ of error should be dismissed because it was not sued out within the time prescribed by the act of May 5, 1909. The judgment in this case was rendered prior to the passage of that act, and it is not applicable. *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197.

The judgment is reversed and the cause remanded, with directions to overrule the demurrer and to proceed further.

RYAN v. PITTSFIELD ELECTRIC ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Berkshire, Oct. 19, 1909.)

[89 N. E. Rep. 527.]

Carriers—Injuries to Passengers—Negligence—Question for Jury.—Where, in an action for injuries to a street car passenger while boarding a car, the evidence showed that plaintiff and her sister, standing at a proper place, signaled the car to stop, that the motor-man stopped the car, that while plaintiff with ordinary care was boarding the car it started, and the conductor testified that when he gave the signal he stood on the front end of the car, where he could not see whether any one was trying to board it at the side where plaintiff was, and that passengers were accustomed to get on on either side of the car, the refusal to charge that on the evidence plaintiff could not recover was proper.

Carriers—Injuries to Passengers—Negligence—Question for Jury.*—Though a car has made a reasonably long stop, and an intending passenger has had ample opportunity to board it, the question of the negligence of the conductor, in a position not to see by the exercise of due care whether a passenger is boarding the car, in giving the signal for the starting of the car without going where he may see whether any one is boarding it, is for the jury.

*For the authorities in this series on the subject of negligence in starting a street car while a passenger is attempting to board car, find a seat, or alight, see first foot-note of *Lexington Ry. Co. v. Britton* (Ky.), 33 R. R. R. 237, 56 Am. & Eng. R. Cas., N. S., 237; second head-note of *Beattie v. Detroit United Ry.* (Mich.), 33 R. R. R. 192, 56 Am. & Eng. R. Cas., N. S., 192.

Ryan v. Pittsfield Electric St. Ry. Co**Carriers—Injuries to Passengers—Negligence—Question for Jury.†**

—Where a car was stopped in response to signals, the fact that the car stopped long enough so that the passenger had ample opportunity to board it, and that after the car had stopped a reasonable time he attempted to board it, without paying any attention to the signals to start the car, did no, as a matter of law, make him negligent, nor require him to anticipate that the car would start while he was about to board it; but the question of his negligence was for the jury.

Exceptions from Superior Court, Berkshire County; John C. Crosby, Judge.

Action by Mary A. Ryan against the Pittsfield Electric Street Railway Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action of tort, brought by the plaintiff for medical attendance, medicines, and personal injuries sustained by her while boarding one of defendant's cars. The court refused defendant's requests for instructions as follows:

"(1) On all the evidence the plaintiff is not entitled to recover."

"(3) If the jury should find that the car made at Park street a reasonably long stop, and that it was a place where it was proper and convenient for passengers to get on and off the car at either side, and the plaintiff had ample opportunity to get on the car, and that it is not proven that the position in which the conductor was when he started the car was an improper position for him to be in, and that from there he could not see by the exercise of due care that the plaintiff was boarding the car as claimed by her, it was not negligence for the conductor to order the car started, nor for the motorman to start the car, without going about the car to see whether anyone was still boarding the car.

"(4) If the jury finds that the car stopped long enough so that the plaintiff had had ample opportunity to board the car, and that after the car had stopped a reasonable time to afford the plaintiff ample opportunity to have boarded the car, she attempted to board the car, as claimed by her, without paying attention to the ringing of the bell to start the car, she would not be in the exercise of due care."

Noxon & Eisner, for plaintiff.

Wm. Turtle and Jos. M. McMahon, for defendant.

SHELDON, J. The first instruction requested by the defendant was that on the evidence the plaintiff was not entitled to re-

†For the authorities in this series on the question whether it is contributory negligence to attempt to board a moving street car, see last foot-note of *Payne v. Springfield St. Ry. Co.* (Mass.), 33 R. R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186.

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cover. Manifestly this could not have been given. There was evidence that the plaintiff and her sister, standing at a proper place, signaled the defendant's car to stop and receive them as passengers; that the motorman saw them waiting for the car, must have seen their signal, and stopped the car accordingly; that while the plaintiff was in the act of getting on the car the conductor gave the signal to start the car, it started, and the plaintiff was thrown down and injured. The jury properly could find that the plaintiff was in the exercise of due care, and that the conductor was negligent in causing the car to be started before she had had opportunity to get fully upon the car. The conductor himself testified that when he gave the signal to start the car he was standing on the front end of the car where he could not see whether anybody was trying to get upon it at the side where the plaintiff was, and that passengers at this point were accustomed to get upon either side of the car indifferently.

The second instruction requested was given.

The third request was not a correct statement of the law. Even if the car had made a reasonably long stop and the plaintiff had had ample opportunity to get on the car, and the conductor's position was not proved to have been an improper one, yet if from that position he could not see by the exercise of due care whether an intending passenger was boarding the car, it could not be said as matter of law that it would not be negligent for him to order the car to be started without going where he could see whether any one was boarding the car. The jury must determine this question. The instructions given as to this matter were correct and sufficient. *Millmore v. Boston Elevated Ry.*, 194 Mass. 323, 326, 80 N. E. 445, 11 L. R. A. (N. S.) 140, 120 Am. St. Rep. 558; *Rand v. Boston Elev. Ry.*, 198 Mass. 569, 84 N. E. 841; *Lockwood v. Boston Elev. Ry.*, 200 Mass. 537, 86 N. E. 934; *Marshall v. Boston Elev. Ry.*, 203 Mass. 40, 88 N. E. 1094.

The fourth request is defective in the same particulars as the third. As in the cases above referred to, it could be found that the defendant's servant had stopped the car in response to the plaintiff's signal, and had thereby invited her to become a passenger; and in that event, even if the circumstances mentioned in this request were found to exist, it could not be said as matter of law that she was necessarily negligent, or that she was bound to anticipate that the car would be started while she was about to board it. This case is unlike *Bentson v. Boston Elev. Ry.*, 202 Mass. 377, 88 N. E. 437. It was for the jury to determine what the existing circumstances were and whether in view of those circumstances the plaintiff acted with proper regard to her own safety. This was the effect of the instructions given.

Exceptions overruled.

WIGG v. ERIE R. CO.

(Circuit Court of Appeals, Second Circuit, November 9, 1909.)

[174 Fed. Rep. 401.]

Carriers—Injury to Passenger—Evidence of Carrier's Negligence.

—The mere facts that a railway passenger, in passing from one car into another, fell and was injured, and that the platform of one car was higher than the other by three or four inches, do not render the railroad company liable for the injury, in the absence of any evidence as to what caused the fall, or that the difference between the height of the platforms was unusual or dangerous.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Mamie E. Wigg against the Erie Railroad Company. Judgment for defendant on directed verdict, and plaintiff brings error. Affirmed.

Charles W. Stapleton, for plaintiff in error.

Stetson, Jennings & Russell (*Frederick B. Jennings* and *William C. Cannon*, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The plaintiff was the only witness sworn. She testified that about 4:30 o'clock on the afternoon of February 2, 1906, she boarded the rear car of a train standing in the defendant's train shed at Jersey City, destined for her home at Nutley, New Jersey. She had frequently made the trip to New York and back. The train was advertised to leave about ten minutes later. The conductor, who knew the plaintiff, came forward and suggested that she would find pleasanter accommodations in the forward car. He took her parcel and she followed him. Her account of what occurred thereafter is as follows:

"Q. Then what happened? A. Well, in crossing from the rear car to the forward car I fell full length into the forward car. One car was elevated above the other.

"Q. You mean the platform of the car? A. I mean the platform of the car.

"Q. About how much? A. Well, after it all happened I looked back and it seemed to be three or four inches. It seemed to be quite an elevation."

On cross-examination she said:

"Q. Now, you say that you fell headlong into the forward car? A. Yes.

"Q. That is, your head and at least a part of your body went

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through the doorway? A. No, the door was open. You said through the doorway.

"Q. Your head and part of your body went through the doorway? A. Yes. After I had been assisted to my feet I looked around and saw this difference in height of the floors between the cars. I was in pain at the time."

This is all the testimony relating to the cause of the accident. The sole charge of negligence is based upon the alleged difference in the height of the platforms of the two cars which the plaintiff thought to be between three and four inches. It is suggested that she may have tripped at this point. It will be observed, however, that when she looked back she was in the forward car which was higher than the rear car and, therefore, could not see with any accuracy the extent of the discrepancy between the cars, assuming that a difference in height existed. In other words, if she struck her foot against the higher platform of the forward car she could not, after entering the car and looking back at the platform, tell with any accuracy its height above the platform of the rear car. On the other hand, if the platform of the rear car were higher than the other she could not have struck her foot against the projection and it is hardly possible that the fall described by her could have resulted from stepping down three or four inches. But it will be observed that she does not say that she struck her foot against this obstruction, if it existed, or that it in any way caused the fall. All is left to conjecture. For aught that appears she may have caught her foot in her skirt or tripped on the door-sill. The precise cause of the accident does not appear and the plaintiff, upon whom rested the burden, has failed to show any negligence on the part of the defendant.

Even though it be conceded that the forward platform was higher than the other and that the plaintiff tripped thereon, we fail to see how the cause of action was proved in the absence of testimony that such construction was unusual or dangerous. The court can almost take judicial notice of the fact that the platform is frequently lower than the floor of the car and that in many cars the threshold is raised at least an inch, creating an obstruction which might cause a careless or unobservant person to stumble. Then too it is obvious that various causes which cannot be foreseen may cause a slight discrepancy in cars whose platforms as originally built were of uniform height.

The one fact which clearly appears from the proof is that the plaintiff while passing from one car to another of the defendant's stationary train fell and seriously injured herself. That the defendant was in any way responsible for these injuries has not been shown.

The judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. *v.* SHAW.

(Supreme Court of Arkansas, Feb. 7, 1910. On Rehearing, Feb. 28, 1910.)

[125 S. W. Rep. 654.]

Carriers — Injury to Passengers — Proximate Cause — Concurring Negligence.*—Deceased, having alighted from defendant's train at a junction point, while waiting for his train on another road using the same station, was struck or jostled by an express hand truck so that he was struck and killed by defendant's passenger train, which then passed the station at a high rate of speed, without signal or warning, of the approach of which plaintiff was ignorant. Held, that the negligence of defendant in so running the train past the station concurred with the negligence of the servants of the express company in striking deceased with the truck as a proximate cause of decedent's death, rendering the railroad company liable therefor.

Carriers—Death of Passenger—Action—Instructions.—Where a passenger, while standing at a junction station, was jostled by an express truck so close to a train, then passing the station without warning, that he was struck and killed, instructions that, if the truck belonged to an express company, and was handled by its employees, and if deceased was knocked into or near the railroad track and in front of the train by the truck operated by such employees, and on account thereof was run over and killed, the jury should find for defendant were erroneous, as placing the responsibility for the injury entirely on the act of the truckmen; it appearing that the train operatives were also negligent in running the train past the station without signal.

Carriers—Duty to Passengers—Protection from Dangerous Habits of Other Servants.†—A carrier owes to passengers, and others, lawfully using its station platform the duty to protect them from dangerous habits of the servants of an express company in negligently moving trucks about the platform without warning.

Carriers—Death of Passenger—Action—Instructions.—Deceased, a 17 year old boy, while waiting for his connection at a junction station, was jostled by an express truck, and struck and killed by defendant's passenger train, which approached without warning or signal. Held,

*For the authorities in this series on the subject of concurring negligence, see last foot-note of *Blodgett v. Central Vt. Ry. Co.* (Vt.), 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511.

†For the authorities in this series on the subject of the duty of the carrier to protect its passengers against strangers, see foot-note of *Miller v. West Jersey & S. R. Co.* (N. J.), 14 R. R. R. 267, 37 Am. & Eng. R. Cas., N. S., 267; last foot-note of *Illinois Cent. R. Co. v. Gunterman* (Ky.), 33 R. R. R. 203, 56 Am. & Eng. R. Cas., N. S., 203; first foot-note of *McMahon v. Chicago City Ry. Co.* (Ill.), 32 R. R. R. 536, 55 Am. & Eng. R. Cas., N. S., 536.

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that an instruction that, if just prior to the accident deceased could have gone around, or stepped out of the way of the truck, by moving toward the depot instead of toward the track, it was his duty to have done so, and his failure so to do was negligence, requiring a verdict for defendant, was erroneous as pretermittting proof that deceased did not know of the approach of the train, that no warning was given, and also deceased's age, holding him to the highest degree of discretion and judgment under the circumstances.

Appeal from Circuit Court, Hempstead County; Jacob M. Carter, Judge.

Action by J. H. Shaw, as administrator of the estate of Joe Shaw, deceased, against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Kinsworthy & Phaton and Jas. H. Stevenson, for appellant.
McRae & Tompkins and D. L. McRae, for appellee.

MCCULLOCH, C. J. This is an action instituted by the administrator of the estate of Joe Shaw, deceased, to recover damages resulting from the injury of said decedent by one of appellant's passenger trains at Hope, Ark. Deceased was a boy 17 years of age, and was on his way from Emmett, a station on appellant's road, to Washington, Ark., which is on the line of the Arkansas & Louisiana Railway Company. He came from Emmett to Hope over appellant's line, and at the time he was run over by the train he was waiting for his train to start on the Arkansas & Louisiana Railroad. The two roads jointly used the same station and platform at Hope. Deceased was accompanied by his brother, who was his elder by only two years. While waiting for the train he, with other passengers, was on the platform. While he was standing on the platform a few feet from the railroad track, and looking up the track, he either was struck from behind by a moving baggage or express hand truck, and knocked or jostled toward the track, or stepped toward the track to get out of the way of the truck. This occurred just as a passenger train from the south passed along at a high rate of speed, and he was caught by the pilot beam of the engine, knocked under the train, and mortally injured. Some of the witnesses say he was struck from behind by the truck, and knocked or jostled toward the track. Another witness says he was struck by the truck which "kinder staggered him, and he just made one step before the train hit him." Others say he stepped over toward the track to get out of the way of the truck and lost his balance, and another witness says that deceased was never in the way of the truck, but took a position on the platform close enough to the track for the pilot beam of the engine to strike him. It ap-

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peared that he was unconscious of the approach of the truck on the platform or of the train, and was looking in the other direction. Another train was switching in the yard near by, and there was enough noise and confusion to drown the noise of an approaching train. The testimony warranted a finding that no signals, by bell or whistle, were sounded by the approaching engine.

The court, over appellant's objections, submitted the case to the jury on the following instructions requested by appellee: "(2) You are further told that where a railroad company is running its trains through populous communities, towns, and cities, where the presence of persons upon the track is to be expected, it is its duty to give notice in some way, either by sounding the whistle, ringing the bell, or in some other way, of the approach of the train, and, if necessary, to reduce the speed of the train. So in this case, if you believe from the evidence that the deceased was without fault, and that he was killed by reason of the failure of the defendant to discharge its duty in this regard, your verdict should be for the plaintiff.

(3) If you believe from the evidence that the death of the deceased was caused by the negligence of the defendant company, a recovery will not be defeated on the ground of contributory negligence, unless it appears from the evidence that the deceased himself failed in the exercise of ordinary prudence, and that such failure so contributed to the injury that it would not have occurred if he had been without fault." The court also gave four other instructions at appellant's request as to the duty of deceased under the circumstances, and also gave the following at appellant's request: "The jury are instructed that the defendant had the right to run its train through the town of Hope without stopping, and that the employees of defendant in charge of said train had a right to presume that passengers and parties on the platform would keep out of the way of moving trains, and the jury are instructed that the defendant is not liable for running its trains through the said town of Hope at the speed shown by the evidence."

It is contended that if the evidence shows that deceased was struck by a hand truck, operated by a servant of the express company, the alleged negligence of the trainmen in failing to give signals was not the proximate cause of the injury, and that instruction No. 2 was erroneous in submitting the case to the jury on that charge of negligence. The evidence warranted the finding of a state of facts constituting concurring negligence on the part of the trainmen in failing to give signals, which rendered appellant liable for damages. When the truck came along and struck deceased, or caused him to step aside, he was standing very near the track, looking in the opposite direction, and was apparently unconscious of his danger. He was not in-

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jured by being struck by the truck; but his proximity to the railroad track caused him, when struck by the truck, or when he stepped out of the way of the truck, to get near enough to the track for the passing train to catch him. His position in close proximity to the track was an incident to the injury, and this was caused by the negligence of the trainmen in failing to give signals of the approach of the train, as the jury might have found, that he would not have been in that position if he had received proper notice of the approach of the train. There were two street crossings near by, and the statutes require that signals be given under such circumstances. If a warning had been given, deceased would not have been close enough to the track to be struck by the train, or to be knocked or jostled over near the track as the train passed along. Thus the negligence of the trainmen concurred with the negligence of the truckman in producing the injury. In other words, the negligence of the trainmen caused deceased to be in a position where he was injured, and where he would not have been but for the act of negligence, which thus became one of the efficient causes of the injury. *City Elec. Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Chicago Mill & Lbr. Co. v. Cooper*, 90 Ark. 326, 119 S. W. 672; *St. L., I. M. & S. Ry. Co. v. Corman*, 122 S. W. 116.

The court refused to give the following instructions requested by appellant: "(8) If the jury believe from the evidence that the truck in question belonged to the Pacific Express Company, and was handled by employees of that company, then the defendant railway company is not liable, and you will so find." "(12) If the jury believe from the evidence that deceased was pushed or knocked onto or near the railroad track and in front of a moving train, by a truck owned and operated at the time by the Pacific Express Company, and on account of such push or knock was run over and killed by the train, you will find for defendant." These instructions were asked on the theory that the act of the agent of the express company in running the truck against deceased was that of an independent agency, for which appellant was not responsible. These instructions were, however, erroneous, even if it be conceded that appellant was in no wise responsible for the alleged negligent act of the truckman, for these instructions place the responsibility for the injury entirely upon the act of the truckman; and, as the jury had a right to conclude that the negligence of the trainmen was a concurring cause of the injury, it was incorrect to say that the verdict should be for appellant if it was found that the truckman who ran the truck against deceased was a servant of the express company. If the negligence of the trainmen concurred as a proximate cause of the injury, it matters not what other agency was the other concurring cause. But the

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instructions were incorrect in other respects. Even if it be conceded that the railway company was not primarily responsible for the servants of the express company, still it owed passengers and others using by lawful rights its premises the duty of protection from dangerous habits of such servants in negligently moving trucks about the platform, without warning to any one. *Huddleston v. St. L., I. M. & S. Ry. Co.*, 90 Ark. 378, 119 S. W. 280. There was evidence to the effect that the truckman of the express company was permitted to pursue a course of conduct in operating trucks about the platform which was dangerous to those on the platform, and it would have been erroneous, in any view of the case, to tell the jury broadly, as is done in these instructions, that the railway company was not responsible for the negligent act of the truckman.

Error is assigned in the refusal of the court to give the following instruction: "(9) If the jury believe from the evidence that at or just before the time deceased, Joe Shaw, was struck by defendant's engine, he could have gone around or stepped out of the way of the truck in question by moving towards the depot, instead of moving towards the railroad track, then it was his duty to have done so—moved towards the depot—and his failure to do so, and moving towards the railroad track and in front of the approaching train, was negligence on his part, and you will find for the defendant." This instruction was clearly erroneous, even if it was correct in other respects, in leaving out of account the fact that deceased did not know of the approach of the train, and that no warning of its approach had been given. It also leaves out of account the age of deceased, and holds him to the highest degree of discretion and judgment under trying circumstances. The instruction was properly refused.

There are other assignments of error which we do not deem of sufficient importance to discuss.

The judgment is affirmed.

BATTLE, J., not participating.

On Rehearing.

McCULLOCH, C. J. We find, on re-examination of the evidence in the record, that we were not justified in saying that "there was evidence to the effect that the truckman of the express company was permitted to pursue a course of conduct in operating the trucks about the platform which was dangerous to those on the platform." This does not, however, change the result; for the requested instruction was properly refused for other reasons stated in the opinion. We do not wish to be understood as holding that the railroad company is not responsible for the negligent act of the servant of the express company. It is unnecessary to pass on that question.

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We held in *Huddleston v. Railway Co.*, 90 Ark. 378, 119 S. W. 280, that a railway company is not primarily liable for the negligence of a mail agent; but whether or not the same rule should be applied as to liability for negligence of a servant of the express company using the premises of the railway company under contract and by permission we do not undertake to decide in this case.

Rehearing denied.

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(Court of Appeals of Kentucky, Nov. 26, 1909.)

[122 S. W. Rep. 806.]

Appeal and Error—Review—Weight of Evidence.—The jury has the exclusive right to weigh conflicting evidence.

Railroads—Injury at Crossing—Right of Action—What Law Governs.—The right of recovery for injuries at a railroad crossing in another state is, in the absence of a statutory provision, to be determined by the laws of that state as declared by its Supreme Court.

Carriers—Injury at Station—Contributory Negligence.—A person going to a train then due to meet a friend, who exercised due care to observe the situation in passing from the depot to the train, was not so negligent in undertaking to pass between cars three feet apart on an intervening track as to prevent his recovery for injuries by one of the cars suddenly closing the space, under the rule in Alabama that the failure to stop, look, and listen before crossing a railroad track is such contributory negligence as will defeat a recovery for injuries, in the absence of evidence that the company was guilty of reckless or wanton negligence.

Carriers—Care of Persons Accompanying Passenger.*—Though a carrier does not owe a person going to a train to meet a friend the degree of care due a passenger, it must exercise ordinary care for his safety.

Carriers—Care of Persons Accompanying Passenger.—A person going to a train to receive a passenger need not wait until the train actually arrives before going to the platform in order to avail himself of

*For the authorities in this series on the subject of the duties and liabilities of the carrier to persons assisting or accompanying its passengers, see first foot-note of *Morrow v. Atlanta & C. A. L. Ry. Co. (N. Car.)*, 10 R. R. R. 290, 33 Am. & Eng. R. Cas., N. S., 290; second foot-note of *Arkansas & L. Ry. Co. v. Sain (Ark.)*, 32 R. R. R. 579, 55 Am. & Eng. R. Cas., N. S., 579; last paragraph of last foot-note of *St. Louis, etc., Ry. Co. v. Grimsley (Ark.)*, 32 R. R. R. 170, 55 Am. & Eng. R. Cas., N. S., 170; foot-note of *Cole's Adm'r v. Chesapeake & O. Ry. Co. (Ky.)*, 31 R. R. R. 453, 54 Am. & Eng. R. Cas., N. S., 453.

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the rule of law that requires a carrier to exercise ordinary care for his safety.

Carriers—Injuries at Station—Care Due Travelers.—Where an opening in a train at a station has been made for the passage of persons, the duty to give warning before closing the space is not satisfied by merely ringing the engine bell or sounding the whistle.

Carriers—Injuries at Station—Negligence—Question for Jury.—Whether sufficient warning was given before closing the space left for the passage of persons between cars at a station is a question for the jury.

Carriers—Injury at Station—Instruction.—Where the evidence is conflicting as to whether defendant exercised sufficient care to give warning before closing the space left for the passage of persons between cars at a crossing, it is proper to instruct to find for defendant if plaintiff would not have been injured except for his contributory negligence, unless when he came in peril defendant's employees could, by the exercise of ordinary care, have discovered his peril and prevented the injury.

Damages—Punitive Damages—What Law Governs.—The laws of the state wherein a personal injury occurred govern the question whether punitive damages should be awarded.

Evidence—Presumptions—Law of Other State.—In the absence of proof of the law as to punitive damages for personal injuries in the state where the injuries occurred, the law of the state is presumed to be the same as that of the forum.

Negligence—"Gross Negligence."—"Gross negligence" is the absence of slight care.

Damages—Punitive Damages—Personal Injuries.—Where the negligence from which a personal injury results is gross, punitive damages may be awarded.

Carriers—Injury at Station—Negligence—Sufficiency of Evidence.—Evidence, in an action for injuries at a station, held to show that plaintiff was injured by defendant's reckless disregard of its duty to plaintiff.

Appeal and Error—Harmless Error—Punitive Damages—Instructions.—The objection to an instruction on punitive damages that the words "or may not" should have been inserted after the words "then you may" in the clause allowing an award of such damages is too technical for consideration.

Damages—Propriety of Instructions on Punitive Damages.—Where there is evidence that the injury at a crossing was caused by a reckless disregard of human life, an instruction on the subject of punitive damages is proper.

Damages—Excessive Damages—Personal Injuries.—Verdict for \$12,500 for permanent personal injuries held not excessive.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

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Action by L. W. Smith against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Helm & Helm and *Benjamin D. Warfield*, for appellant.
W. O. Bradley and *Snodgrass & Debrille*, for appellee.

CARROLL, J. The appellee, Smith, at Blount Springs, Ala., while on his way to the depot platform from which passengers got on and off trains, was caught between the bumpers of the cabooses on two trains on the siding between the depot and the passenger platform. Both of his hands were crushed so badly that his right hand had to be amputated and his left hand is practically useless. To recover damages for the injuries sustained he brought this action, and upon a trial before a jury was awarded \$12,500.

A reversal is asked upon four grounds: First, that under the laws of Alabama the plaintiff was guilty of contributory negligence in endeavoring to pass between the trains, which were attached to engines with steam up, and therefore the defendant's motion for a peremptory instruction should have been sustained; second, that the court erred in instructing the jury that they might find for the plaintiff, Smith, notwithstanding his contributory negligence, if they believed that when he came in peril from the trains the employees of the company in charge of the trains could, by the exercise of ordinary care, have discovered his peril and by ordinary care have prevented his injury; third, that the court erred in allowing the jury to award punitive damages if they found the defendant guilty of gross negligence; fourth, that the company's theory of its defense was not submitted to the jury, and the instructions given are involved in confusion.

The evidence upon all material points is conflicting but with the weight of it on any issue we are not particularly concerned, as the jury have the exclusive right, in cases like this, to decide controverted questions of fact. Therefore, having in mind only the controlling facts, and without attempting to set out the testimony in detail, we may say that the evidence is, in substance, as follows: Blount Springs is a small village immediately on the line of the appellant's railroad, and at the time of the injuries complained of it was frequented by a number of people who went there to visit the springs in the neighborhood. The appellee, a native of Texas, arrived at Blount Springs for the first time on the morning of July 22, 1907, and spent the day in and around the hotel and the village. About 5:40 in the afternoon he started on his way to the passenger platform for the purpose of meeting a friend he was expecting on the north-bound Decatur passenger train that was due to arrive about the time he went to the station. The railroad at Blount Springs

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runs north and south, and on the east side of the road is situated the depot, the houses that constitute the village, and the springs. The track nearest to the depot is a long siding, and between this siding and the main track is the platform used by passengers in getting on and off trains standing on the main track. At the time appellee started to go to this platform there were on the siding four trains. One of these trains, known as No. 12, was a long freight, headed north, that went in on the south end of the siding, and pulled up until its caboose was opposite the depot and then stopped. Soon thereafter train No. 21, known as the "water train," consisting of an engine, two cars, and a caboose, backed in on the siding from the south end, and stopped with its caboose some 30 to 60 feet from the caboose of train No. 12 thereby leaving a space of that distance between the two cabooses immediately in front of the depot, through which persons going to and from the passenger train to the depot might pass. Shortly after the water train backed in, a long freight train, known as No. 19, going south, also backed in on the south end of the siding, and stopped with its caboose some 40 to 80 feet from the engine of the water train. After this, passenger train No. 8, going north, also ran partially in on the south end of the siding, but could not go far enough to clear the main track on account of the freight trains. About the time that passenger train No. 8 went in on the siding, passenger train No. 5, going south, came up on the main track, and stopped in front of the depot to permit passengers to get on and off. With the four trains on the siding, and the spaces before mentioned that had been left between them, passenger train No. 5 going south could not pass passenger train No. 8 standing partially on the south end of the siding and partially on the main track. So that, when passenger train No. 5 started on its journey south, signals were given to the engineers on the water train and on train No. 19 to close up the spaces, in order that passenger train No. 8 might pull far enough in on the siding to allow passenger train No. 5 to pass in safety. But before the space between the cabooses in front of the depot was closed at all by the moving of the water train, a number of passengers and people had passed between the cabooses going to and from the train and the platform. Appellee was not at the depot or observing the trains when the space between the cabooses was 30 to 60 feet, or when the signals to close the space were given, or when the water train started back, but about the time he reached the depot on his way to the platform the caboose of the water train had been backed to within 3 to 10 feet of the caboose of train No. 12, and was standing still, and the caboose of train No. 19 had been backed close to the engine of the water train. Just as appellee, who stopped, looked, and listened to ascertain if the passage was safe, stepped on

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the siding, the water train suddenly backed, and he was caught between its caboose and the caboose of train No. 19, which had never moved its position after going on the siding. The evidence is very satisfactory that when the water train by backing closed up the original space of 30 to 60 feet between it and train No. 19 to a distance of from 3 to 10 feet, it stopped for a few minutes, and it may be inferred from the testimony that the trainmen did not intend, at this time, to run it any closer to the caboose of train No. 19, and that the sudden movement of the water train that caught appellee was caused by the slack running out of train No. 21, the caboose of which had been stopped within a few feet of the engine of the water train, and striking the engine of the water train, thereby shoving it and its cars back. At the moment appellee was injured the trainmen who were giving the signals that moved the water train and train No. 19, were standing between the siding and the main track, but before this, and when the passengers from No. 5 were being discharged and the signals to close the space were about to be given, these trainmen, and probably others, notified people to get out of the way; that the space would be closed. Whether or not any persons were on the rear platform of the caboose of the water train, or the caboose of train No. 12, when appellee was injured is sharply disputed; the evidence for the company being that one brakeman was on the rear platform of the water train caboose, and one brakeman on the rear platform of the caboose of train No. 12, while the evidence for the appellee is that there was no brakeman at that time on either of these cabooses. The evidence also conduces to show that, just as the cabooses came together, one of the trainmen, and probably a spectator, holloed at appellee in an effort to warn him of his danger, but it was too late.

From this statement it may be summarized that there was evidence sufficient to sustain the verdict conducing to show: (1) That when the trains were put on the siding, and until passenger train No. 5 started, there was a space of from 30 to 60 feet in front of the depot between the cabooses, left for the purpose of permitting persons to go to and from the depot to the passenger train; (2) that when passenger train No. 5 started, it was intended to close the space of 40 to 80 feet between the caboose of train No. 19 and the engine of the water train, and to partially at least close the space in front of the depot between the caboose of the water train and the caboose of train No. 12, so that No. 8 might clear the main track and allow No. 5 to pass; (3) that when the caboose of the water train came within 3 to 10 feet of the caboose of train No. 12, the water train stopped, and after stopping for a few minutes it was put in motion, and its caboose caused to hit the caboose of train No. 12; (4) that at the time Smith was injured the bells on the

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engine of train No. 19 and on the engine of the water train were ringing; (5) that train No. 8, on which appellee expected the person he went to the depot to meet, would have reached the depot platform a few minutes after he started to go to the platform; (6) that appellee did not know anything about the movements of the trains until he went to the depot to cross, and then there was a space in front of the depot of 3 to 10 feet between the cabooses of train No. 12 and the water train, both of which were standing still; (7) that before appellee went between the cabooses, he stopped, looked, and listened to ascertain if it would be safe to cross, and had no warning or notice that it would not.

Upon these facts the court gave to the jury the following instructions:

"No. 1. The court instructs the jury that the law is for the plaintiff, and they should so find, unless they shall believe from the evidence that, before the defendant moved its trains, or either of them, which were standing on the passing switch at Blount Springs, Ala., at the time mentioned in the petition to close the passageway across the said switch between the ends of its two freight trains then standing on said switch track, the employees of the defendant in charge of the train by which plaintiff was injured exercised ordinary care to give timely and reasonably sufficient notice that the train was about to be moved to close the said passageway, and exercised ordinary care to prevent injury to the plaintiff from the moving train, unless they shall further believe from the evidence that the plaintiff himself was negligent, and thereby helped to cause or bring about his injuries; that but for his own negligence, if any there was, he would not have been injured.

"No. 2. But if the defendant did give timely and reasonable notice, as mentioned in instruction No. 1, that the passway between the said trains was about to be closed by backing one or both of said trains, and did exercise ordinary care to prevent injury to the plaintiff from the moving train, the law is for the defendant, and so they should find.

"No. 3. It was the duty of the plaintiff, before he entered upon the passway between the said two trains, to exercise ordinary care for his own safety, and to stop and look and listen to ascertain whether he could cross the track without injury from the said trains; and, if he failed to discharge either of these duties, and by reason of such failure he helped to cause or bring about the injuries of which he complains, and he would not have been injured but for his contributory negligence in that respect, then the law is for the defendant, and so they should find, even though you may believe from the evidence that the defendant was negligent in failing to give notice of the fact that the train was about to be backed to close the

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passageway, if such is the fact, unless you shall further believe from the evidence that when the plaintiff came in peril from the train, the employees of the defendant in charge of the train could, by the exercise of ordinary care, have discovered his peril, and by ordinary care have prevented his injury.

"No. 4. If you find for the plaintiff, you should find in such a sum as will reasonably and fairly compensate him for any pain and suffering, mental and physical, caused him by his injuries, and for any pain and suffering which it is reasonably certain from the evidence he will endure in the future as a result of his injuries, and for any permanent reduction in his power to earn money directly resulting from his injuries; and, if you shall believe from the evidence that his injuries were caused by the gross negligence of the defendant, then you may in your discretion find in such a further or additional sum as you may think right and proper under the evidence, and on these instructions, not exceeding in all the sum of \$50,000, the amount claimed in the petition. If you find for the defendant, you will say so, and no more.

"No. 5. Ordinary care means the degree of care usually observed by ordinarily careful and prudent persons under the same or similar circumstances. Negligence means a failure to observe ordinary care. Gross negligence means a failure to observe slight care. Contributory negligence means a failure upon the part of the plaintiff, if he did so fail, to observe care for his own safety, as mentioned in instruction No. 3, and by reason of such failure he helped to cause or bring about his injuries, and when but for such failure he would not have been injured."

Under the law of this state, as settled in more than one opinion of this court, the facts of this case authorized the trial court to instruct the jury as it did, and warranted the jury in finding a verdict in favor of Smith and assessing the damages at the amount awarded. But, as the injuries occurred in the state of Alabama, the right of Smith to recover, and the propriety of the instructions given, is, in the absence of any statutory law in that state on the subject, to be determined by the laws of that state as declared by its Supreme Court. *L. & N. R. Co. v. Whitlow*, 43 S. W. 711, 19 Ky. Law Rep. 1931, 41 L. R. A. 614; *Illinois Central R. Co. v. Jordan*, 117 Ky. 512, 78 S. W. 426, 25 Ky. Law Rep. 1610; *L. & N. R. Co. v. Graham*, 98 Ky. 688, 34 S. W. 229, 17 Ky. Law Rep. 1229; *L. & N. R. Co. v. Harmon*, 64 S. W. 640, 23 Ky. Law Rep. 871; *L. & N. R. Co. v. Wyatt*, 93 S. W. 601, 29 Ky. Law Rep. 437; *L. & N. R. Co. v. Keiffer*, 113 S. W. 433. That court has frequently considered questions like the one involved in this case, and counsel in support of their respective contentions have furnished us with an ample array of authorities. And so we will

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proceed to examine these decisions and apply them to the evidence and the law as given by the trial judge, for the purpose of ascertaining whether or not the errors assigned are well taken.

Taking up, first, the question of contributory negligence:

The theory of the company is that at the time appellee went through the opening the space between the two cabooses was not over three feet, and that if the water train was not at that time moving, it had only stopped a moment before, and appellee from his position could and should have known that the trains were closing up the space; that as there was then no passenger train at the platform, and the passenger train upon which appellee expected his friend to arrive was on the siding some distance off, appellee in attempting to cross as he did went into an obviously dangerous place, which, if he desired to cross, he could have avoided by crossing on the platform of one of the cabooses. It may be conceded that, if we should accept as true this view of the case, there would be much force in the argument that the appellee was guilty of such contributory negligence as authorized a direction to the jury, under the law as expounded by the Supreme Court of Alabama, to find a verdict for the company.

In *Pannell v. Nashville, F. & S. R. Co.*, 97 Ala. 298, 12 South. 236, the facts were as follows: Several parallel tracks crossed streets in a town, and on one of these tracks cars had been placed for the purpose of being loaded and unloaded, but at the crossing a space of 15 or 20 feet was left between the cars for the use of the public. The cars had been placed in this way on the day preceding the accident, and Pannell, the injured party, who resided near the crossing, was entirely familiar with the location of the cars. On the day after the cars had been so placed, he passed through this opening, but on his return in about 30 minutes the opening had been materially diminished by an engine that was moving the cars, and in attempting to pass through he was caught between the drawheads and crushed. At the time the cars were placed on the track they were not connected with any engine, nor in charge of any employee, and no notice that the company intended to move them was given until shortly before the accident, when an engine was attached to the cars, and they were shifted about. In the course of the opinion the court said: "When Pannell crossed the track going west, the opening at the crossing was 15 or 20 or more feet, and the cars on either side were stationary. Everything about the crossing indicated perfect security in traveling the highway. When he returned appearances had greatly changed. The lumber cars left on the north side of the crossing had been moved so as to nearly block up the highway. Only a small opening was left. This should have been a warning to him that all was not well. He should have looked and listened. He

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was clearly guilty of contributory negligence in attempting, under the circumstances, to pass through the narrow opening. Had he looked at any time after passing the main track, save a narrow space hidden by a stack of shingles, he could not have failed to see the engine on the spur track with steam up."

In *L. & N. R. Co. v. Crawford*, 89 Ala. 244, 8 South. 243, 244, 245, a watchman while in the discharge of his duties was injured by a switch engine pushing a box car. In announcing the general rule the court said: "It is culpable negligence to cross the track of a railroad at a highway crossing without looking in every direction that the rails run to ascertain whether a train is approaching. If a party rushes into danger which by ordinary care he could have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive. He must take care, and so must the other party. * * * We regard the question as settled in Alabama by our rulings cited above, and that a failure to employ the senses on approaching a railroad crossing, when such employment would insure safety, is as a matter of law contributory negligence, and a complete defense to a suit for injuries sustained by the negligent handling of a railroad train, unless such negligence was so reckless or wanton as to be in law the equivalent of willful or intentional. * * * No man should put himself in peril; and, if he negligently does so, the duty of active effort to avert injury is as binding on him as is the defendant corporation's duty to do all in its power to extricate him. If he fails in this, when such effort would probably save him from harm, he cannot be heard to complain that the defendant failed to do for him what he neglected to do for himself. We have stated the duty required of mere travelers."

In *East Tennessee, Virginia & Georgia R. Co. v. Kornegay*, 92 Ala. 228, 9 South. 557, Kornegay was injured while on his way to a depot to see a person who was a passenger on an east-bound train that had just come in. This train stopped on the main track, and a west-bound train took the side track, and its engine was standing still across a dirt road. Kornegay passed by the side of the engine and walked parallel with the track, and then turned and stepped on the side track in the direction of the east-bound train, which was still standing on the main track. Just as his foot touched the crossing on the side track, he was knocked down by the engine of the west-bound train and injured. The court said: "It appears from Kornegay's own testimony that he was guilty of negligence proximately contributing to the injury. It is plain that he undertook to cross the railroad track without stopping or looking or listening to ascertain if a train was approaching. He says himself that he did not stop or look. When he passed the engine, it was standing still on a downgrade. It appeared from the testimony that the engine

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could not have been put in motion without making a noise, which the plaintiff must have heard if he had been listening. He was not in apparent danger until he turned and stepped on the side track. He was bound to look and listen before attempting to cross the track. His neglect of this duty avoids his right of recovery, in the absence of evidence tending to show that the defendant was guilty of negligence so reckless or wanton as to be in law the equivalent of willful or intentional wrong."

In each of these cases the rule is announced that the failure to stop and look and listen before crossing a railroad track in such contributory negligence as will defeat a recovery, in the absence of evidence showing that the company was guilty of reckless or wanton negligence. But in neither of them are the facts similar to those upon which the appellee rests his case. If we should assume that the railroad company in Alabama owed no higher duty to passengers or persons occupying the relation of appellee than it does to travelers at a public crossing, we should nevertheless feel obliged to hold that under the Alabama rule the appellee was not guilty of such contributory negligence as would defeat a recovery. The evidence introduced in his behalf shows that he was not negligent or inattentive, but that, on the contrary, before attempting to cross, he exercised ordinary care for his own safety by stopping and looking and listening. The appellee in attempting to go to the passenger platform was not a trespasser. He had a right to go there; and, although the company did not owe him the high duty attaching to a passenger, it did owe him the duty of exercising ordinary care for his safety. *Montgomery & Eufaula Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; *Berry v. L. & N. R. Co.*, 109 Ky. 727, 60 S. W. 699, 22 Ky. Law Rep. 1410; *C. & O. Ry. Co. v. Meyer*, 119 S. W. 183; *Hutchinson on Carriers* (3d Ed.) § 991; *Thompson on Negligence*, §§ 2685, 2686. The fact that the train upon which he was expecting his friend was not then standing on the main track at the depot for the purpose of discharging passengers is a matter of small moment, as it was only a short distance off on the siding, and might reasonably be expected to reach the depot in a few minutes, and was in fact due to arrive. A person going to the train to assist or accompany or receive a passenger need not wait until the train actually arrives before going on the platform, in order to avail himself of the principles of law that require the carrier to exercise ordinary care for his protection and safety. He may go to the platform when he sees the train approaching, or when it is reasonably near, or at the time he believes it should arrive. This being so, when appellee went to the depot, and saw an opening between the two cabooses amply wide for passage to the platform; saw other persons going through it; saw the trains standing still—he had the right to as-

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sume that the opening through which he attempted to pass had been purposely left there to permit persons to go to and from the depot and platform. The fact that the opening was there was an invitation to avail himself of it to cross. When an opening like this is left in a place like this, it is the duty of the railroad company to exercise ordinary care to prevent injury to persons rightfully using it, and this duty, under circumstances like those proven in this case, is not fulfilled by ringing engine bells or sounding whistles. The duty of the company in this respect is not discharged until, or unless, it has given reasonably sufficient warning to the public having the right to use the passway that it is about to be closed; and whether or not it performed its duty in this particular was in this case a question for the jury. Tested by the Alabama rule, the appellee was not guilty of such contributory negligence as would defeat a recovery, and under the facts it was not necessary to show that the company was guilty of reckless or wanton conduct that would be in law the equivalent of willful or intentional wrong. This principle is only to be applied when it is attempted to avoid the consequences of a state of facts that would amount to such contributory negligence as would defeat a recovery in the absence of willful or intentional wrongdoing on the part of the company. When the injured person has not been guilty of this character of contributory negligence, it is not essential under the Alabama law that the company should be guilty of willful or intentional wrongdoing before he can recover. The Kentucky Cases of *Southern Railway Co. v. Clarke*, 105 S. W. 384, 32 Ky. Law Rep. 69, 13 L. R. A. (N. S.) 1071, *Southern Railway Co. v. Thomas*, 92 S. W. 578, 29 Ky. Law Rep. 79, and *Brackett's Adm'r v. L. & N. R. Co.*, 111 S. W. 710, 33 Ky. Law Rep. 921, 19 L. R. A. (N. S.) 558, cited by counsel, are not in conflict with the views we have expressed on the subject of contributory negligence. On the contrary, they are in harmony with them.

The next argument presented as grounds for reversal is that the court erred in instructing the jury that, if they believed appellee would not have been injured except for his contributory negligence, they should find for the company, "unless they further believe from the evidence that when he came in peril from the trains, the employees of the defendant in charge of the train could, by the exercise of ordinary care, have discovered his peril, and by ordinary care have prevented his injury." The objection raised to this instruction is that there was no evidence upon which to base the qualifying clause relating to the discovery of the peril in which appellee was placed. This objection is not well taken. Looking at the instruction from the viewpoint that it was the duty of the company to give reasonably sufficient notice to warn persons not to use the passway, the instruction was proper. We have found that the ringing of the bells was not

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sufficient notice, and in effect that the full measure of the company's duty required that some of its employees should have been stationed at the opening to notify appellee and others not to use it. It is true that the evidence for the company shows that it did have employees stationed at suitable places to perform this duty; but, on the other hand, the evidence for appellee shows that it did not. With this conflict in the evidence it was the duty of the court to submit to the jury the theory of each of the litigants, and to do this the court gave this instruction. If the company had exercised the degree of care required under the circumstances, the peril of appellee could have been discovered in time to prevent the injury, as the employees, if located where they should have been, could have warned appellee not to cross. This view of the law was expressed in *Louisville Railway Company v. Hudgins*, 124 Ky. 79, 98 S. W. 276, 30 Ky. Law Rep. 316, 7 L. R. A. (N. S.) 152, where it was said, in answer to a similar objection to a like instruction: "It was the duty of appellee when she started to cross the tracks to exercise ordinary care for her own safety; but, although she failed to do this, and her failure may have contributed to such an extent to bring about the injury of which she complains that it would not have happened except for her failure to exercise this degree of care, this will not relieve the appellant of liability if the persons in charge of the car that struck her could, by the exercise of ordinary care, have discovered the peril appellee was in, and by the exercise of ordinary care have prevented the injury to her. It was the duty of the motorman in charge of the car at this point and place to keep a sharp lookout for persons alighting from the car, and who might be expected to cross the street immediately behind it, and to have his car under such control as that he might stop it at a moment's warning; and it is manifest that, if the motorman had exercised this degree of care, he could and should have discovered the appellee's peril in time to have prevented injuring her. It was therefore entirely proper, under the facts of this case, to qualify the instruction as to contributory neglect as was done."

Did the court err in allowing the jury to award punitive damages if they found the defendant guilty of gross negligence? A careful examination of the Alabama cases introduced in evidence by appellant fails to disclose that that court has ever considered the question when punitive or exemplary damages may be awarded. The question of what constitutes gross negligence is presented in more than one decision, but it always came up in a discussion of the law of contributory negligence, and when the court was indicating the character of negligence on the part of the defendant that would authorize a recovery by the plaintiff notwithstanding he was guilty of negligence. If the Alabama court had denied the class of cases in which punitive damages

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might be allowed, and the character of negligence that would authorize a jury to award it, we would feel bound to follow its ruling, although it might not conform to our decisions on the subject, as the measure of damages recoverable under the law of the place where the injury occurred must control. But, in the absence of decisions from the Alabama court, we will assume that the rule adopted in this state applies in Alabama, or would be applied if the question came up. This principle was laid down in *Chesapeake & Nashville R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35, 23 Ky. Law Rep. 427, where the court said: "Where a party seeks to recover or defend under a foreign law, such law must be pleaded and proved like any other fact; but, in the absence of averments and proof, the rule is that foreign states, whose system of jurisprudence is derived from the same source as our own, are presumed to be governed by the same law." To the same effect is *Murray v. L. & N. R. Co.*, 110 S. W. 334, 33 Ky. Law Rep. 545. Conceding that the law is as we have announced, the argument is yet made that, under the law as declared and administered in this state, the evidence did not warrant exemplary damages, and the instruction submitting this issue was not only unauthorized, but defective in form. This court has repeatedly ruled that gross negligence is the absence of slight care, and that, in personal injury cases where the negligence from which the injury results is gross, punitive damages may be allowed. Without again stating the facts, it is sufficient to say there was ample evidence that the appellant failed to exercise the slightest degree of care for the safety of appellee, and that he was injured by its reckless disregard of the duty it owed him. Nor is the instruction upon this subject open to meritorious criticism. It told the jury that they might in their discretion allow punitive damages. The argument that the words "or may not," after the words "then you may," should have been inserted is entirely too technical to be seriously considered; nor is it sustained by the opinion in *Illinois Central R. Co. v. Houchins*, 121 Ky. 526, 89 S. W. 530, 28 Ky. Law Rep. 499, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205. The addition of these words might slightly improve the verbiage of the instruction, but would make no change in its substance. Whether or not an instruction upon the subject of gross negligence or exemplary damages should be given is often a close one. Frequently, when the verdict appears to be excessive, or the evidence of gross negligence is not satisfactory, we have, as in the *Houchins* Case, ordered a new trial, and pointed out the impropriety of submitting this question. But when there is evidence that the injury was caused by conduct that amounted to a reckless disregard of human life, it is the settled law in this state that an instruction upon this subject is proper. *Lexington R. Co. v. Fain*, 80 S. W. 463, 25 Ky. Law Rep. 2243; *Southern*

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Ry. Co. v. Goddard, 121 Ky. 567, 89 S. W. 675, 28 Ky. Law Rep. 523; L. & N. R. Co. v. Mount, 125 Ky. 599, 101 S. W. 1182, 31 Ky. Law Rep. 210.

But, aside from all this, it is apparent that the jury did not award appellee more than fair compensation. At the time of his injury he was 44 years of age, a strong, vigorous man of good health and industrious habits, in the prime of life and usefulness, earning by his labor and brains an annual income of as much as \$2,000. But now he is virtually a physical wreck. One hand is gone; the other is useless. He cannot follow any wage-earning occupation or business in which the hand is an essential member of the body—and there are few in which it is not. So that, taking into consideration his age, physical condition, and earning capacity, it cannot be said that the amount awarded was more than reasonable compensation for the mental and physical suffering that he has already undergone and the permanent impairment of his power to earn money.

The contention that the instructions are involved and difficult to understand is not well founded. They presented to the jury the law of the case in simple and concise language.

Nor did the court fail in the instructions to submit appellant's defense. It was fully set out in instruction No. 3.

A careful examination of the record and the reasons urged for reversal convince us that no substantial error was committed to the prejudice of the appellant, and the judgment of the lower court is affirmed.

BARKER v. CHICAGO, P. & ST. L. RY. CO.

(Supreme Court of Illinois, Dec. 22, 1909. Rehearing Denied Feb. 15, 1910.)

[90 N. E. Rep. 1057.]

Post Office—Governmental Function.—The government of the United States in the carriage and delivery of the mails is engaged in the discharge of a governmental function.

Officers—Governmental Function—Liability for Negligence of Subordinates.—Public officers and agents of the government are exempt as such from liability to answer for the acts of their subordinates, but are liable for their own personal negligence in the discharge of their duties, but not for the acts and defaults of inferior officials in the public service whether appointed by them or not.

Officers—Negligence of Subordinates—Nature of Service.—The responsibility of a public officer for the acts and defaults of those employed by or under him depends on the question whether the situation of the inferior is a public office or a private service, and if the subordinates are the agents and servants of the officer, not by an official appointment, but to assist him as an individual in the discharge of his official service, the doctrine of respondeat superior applies.

Officers—Negligence of Subordinates—Exemption—Public Policy.—The exemption of public officers from responsibility for the negligence or positive wrongs of their subordinates in the discharge of their public duties arises from consideration of public policy.

Master and Servant—Principal and Agent—Respondeat Superior.—The maxim of respondeat superior is founded on the principle that he who expects to derive advantage from an act which is done by another must answer for any injury which another may sustain from it.

Carriers—Railway Mail Clerk—Liability for Injuries—Governmental Functions.—A railroad in carrying the mails is not an agent or a public officer engaged in a governmental function so as to exempt it from liability for the negligence of its employees, but is only a contractor, and hence it is liable to a mail clerk for injuries received by him while in the discharge of his duty through the negligence of its employees, whose duties were not incidental to the carrying of the mail, in permitting coal cars to come on the main track whereby a collision occurred.

Carriers—Injuries to Mail Clerk—Relation of Parties.*—A railroad is under the same legal duty to avoid injury to a mail clerk carried

*For the authorities in this series on the question whether railway postal clerks are passengers, see first foot-note of *Decker v. Chicago, etc., Ry. Co.* (Minn.), 24 R. R. R. 587, 47 Am. & Eng. R. Cas., N. S., 587.

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in pursuance with a contract with the government as toward an ordinary passenger, regardless of whether the relation of carrier and passenger technically exists or not.

Carriers—Liability to Persons Not Passengers.—The rule that requires the exercise of the utmost care and vigilance to guard against accident extends to every case in which a carrier receives and agrees to transport another not in its employment, whether by contract with the person to be carried or with some other person by whom the person to be carried is employed for the purpose of transacting the employer's business on the cars or other conveyances of the carrier.

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Action by William F. Barker against the Chicago, Peoria & St. Louis Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Wilson, Warren & Child, for appellant.

Albert Salzenstein and John L. King, for appellee.

DUNN, J. The appellee recovered a judgment against appellant for personal injuries, which the Appellate Court affirmed, and the appellant has brought the record to this court for review.

The appellee was a postal clerk in the United States railway mail service, running between Peoria and Springfield over appellant's railroad. His injuries were received while he was attending to his duties in the mail car attached to the appellant's train, and were caused by a collision between that train and two coal cars which had run out upon appellant's main track from a switch connecting such track with an adjoining coal mine. There was evidence tending to show negligence on the part of appellant's servants in permitting the coal cars to come upon the main track.

The appellant claims that it is not liable because in carrying the mail, and the route agent in charge of it, the appellant was a governmental agency performing a governmental function, and was therefore not liable for the negligence of its employees. It further contends that plaintiff was not a passenger; that the highest duty it owed him was the exercise of ordinary care, and that the court erred in instructing the jury that it was appellant's duty to do all that human care, vigilance, and foresight could reasonably do to guard against accidents.

The first question arose upon appellant's motion, at the close of all the evidence, to instruct the jury to return a verdict for the defendant. The switch track from which the coal cars came

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upon the main track was built and maintained by the railroad company at the mine company's cost, and was used by appellant's switching crews in taking the loaded cars from the mine for transportation. There was a derailing device in the switch track about 135 feet from the main track which had no lock, but could be opened or closed by any person, and it was due to the fact that this device was closed instead of open, as it should have been, that the accident occurred. It was therefore a question of fact whether, under all the circumstances, the appellant was negligent in guarding its main track against cars coming upon it from the switch track, and this question was properly submitted to the jury, unless the appellant's contention is sustained that it was engaged in the performance of a governmental function and therefore not liable for the negligence of its employees. Waiving the question whether the construction of the switch and derailing device in the manner in which they were constructed was not negligence of the appellant itself as distinguished from the negligence of its servants, the case will be considered as if the negligence which the evidence tended to prove were only negligence of the servants of appellant in the discharge of their duty.

The government of the United States has the power to establish post offices and post roads, and has assumed exclusive charge of the carriage and delivery of the mail, prohibiting any private person from engaging therein. In so doing the government is engaged in the discharge of a governmental function. The principle is well recognized that public officers and agents of the government are exempt, as such, from liability to answer for the acts of their subordinates. They are liable for their own personal negligence or defaults in the discharge of their duties, but not for the acts or defaults of inferior officials in the public service, whether appointed by him or not. *Robertson v. Sichel*, 127 U. S. 407, 8 Sup. Ct. 1286, 32 L. Ed. 203. The appellant, however, is not a public officer or a public agent. It is a contractor with the government for the performance of a special service, viz., the carrying of the mail, and the same reason does not exist for holding it exempt from liability for the negligence of its servants as for holding the Postmaster General or a postmaster exempt from liability for the defaults of those who act under them in the public service, as agents of the government. "The responsibility of a public officer for the acts and defaults of those employed by or under him depends upon the question whether such persons are acting in the public service, as agents of the government, by direct appointment or by authorized subappointment, or whether they are his private agents and servants employed by virtue of his individual and independent authority and paid by and responsible to him, whom he can employ, retain, and dismiss at will, 'in other words, whether the situation

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of an inferior is a public office of a private service.' 1 Am. Lead. Cas. 785. If the subordinates are the agents and servants of the officer, not by an official employment, but to assist him, as an individual, in the discharge of his official service, the reason ceases for the nonapplication of the doctrine of respondeat superior and for exemption from liability for their misconduct or negligence." *Central Railroad & Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334.

The case just cited was a suit brought by a bank against a railroad company for the loss from the mail of money contained in a registered letter through the negligence of the servants of the company, and it was held that the company would be liable in a proper form of action. In the case of *Sawyer v. Corse*, 17 Grat. 230, 94 Am. Dec. 445, the Supreme Court of Virginia, after a thorough consideration of the exemption of public officers and agents from responsibility for the acts and defaults of those employed by or under them in the discharge of their public duties, and an examination of the decided cases, held a mail contractor liable to the sender for the loss from the mail, through the negligence of the contractor's servant, of a letter containing money.

The exemption of public officers from responsibility for the negligence or positive wrongs of their subordinates in the discharge of their public duties arises from considerations of public policy. Competent persons would not be willing to accept positions which imposed upon them liability for torts and wrongs committed by subordinates whom they did not appoint and could not discharge. These considerations do not apply to a corporation undertaking, by contract, to perform work or render service for the government for a compensation to be paid to it and with a view to its own profit, and where its subordinates are employed and paid by it and liable to be dismissed at its pleasure. It is said in *Sawyer v. Corse*, *supra*: "Such a contractor is in no just and proper sense an officer of the government, and though he may be said to be in a certain sense an agent of the government because he is engaged in working for the government, yet the laborers and others whom he employs under him in the execution of his contract cannot be said to be agents of the government, which does not know them, does not appoint them, does not control them, does not pay them, and has nothing to do with them. He is not a public agent because he is working for his own profit by fulfilling a contract which he has bound himself to perform and for which he is to receive compensation."

The maxim of respondeat superior is founded on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which another may sustain from it. We know of no reason why it

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should not apply here. The employees of the appellant were not public officers or in any official service or employment. They were not employed for the special service of transporting the mails, but were the private servants of appellant engaged in the work of appellant in the general business of transportation for its benefit and profit, employed by appellant and subject to be discharged at its pleasure. It does not appear that the servants of the appellant by whose negligence the injury to appellee is claimed to have occurred were even incidentally engaged in any way in the transportation of the mails.

Several cases have been cited which have held that a mail contractor is not liable for the loss of property transmitted by mail and lost through the carelessness of the contractor's servants. They are *Conwell v. Voorhees*, 13 Ohio, 526, 42 Am. Dec. 206, *Hutchins v. Brackett*, 22 N. H. 252, 53 Am. Dec. 248, *Boston Ins. Co. v. Chicago, R. I. & P. Ry. Co.*, 118 Iowa, 423, 92 N. W. 88, 59 L. R. A. 796, and *Banker's Mutual Casualty Co. v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*, 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397. These cases proceed upon the theory that mail contractors are public agents and not responsible for the omissions, negligence, or misfeasance of those employed by them. We think the cases which hold the contrary are supported by the sounder reason. No case has been cited holding that a railroad company is not liable for an injury caused to a postal clerk by the negligence of its employees while in the mail car in the performance of his duties. There are numerous decisions that they are so liable to the same extent as to a passenger for hire. *Malott v. Central Trust Co.*, 168 Ind. 428, 79 N. E. 369; *Seybolt v. New York, Lake Erie & Western Railroad Co.*, 95 N. Y. 562, 47 Am. Rep. 75; *Mellor v. Missouri Pacific Railroad Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36; *Gulf, Colorado & Santa Fé Railroad Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345; *Libby v. Maine Central Railroad Co.*, 85 Me. 34, 26 Atl. 943, 20 L. R. A. 812; *Lindsey v. Pennsylvania Railroad Co.*, 26 App. Cas. (D. C.) 503; *Collett v. Lovelon & Northwestern Railroad Co.*, 16 A. & E. (N. S.) 984, 71 E. C. L. 984.

It is insisted that the appellant could not be compelled, as a common carrier, to transport the mail, but that its contract to do so was a mere private contract, which did not impose upon it any liability as a common carrier to the appellee, since it was under no common-law or statutory obligation to carry him in the manner he was carried at the time of the accident. The appellee was lawfully on the train, to be carried by the appellant for a consideration received by it under its contract with the government as its compensation for carrying the mail and the person in charge of it. Under such circumstances the law imposes upon

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the railroad company the duty of carrying safely, and the degree of care required is commensurate with the dangerous consequences likely to result from negligence. Whether or not, in a strict sense, the relation of carrier and passenger exists between the railroad company and the postal clerk, courts hold with substantial unanimity that a postal clerk upon a railway train is entitled to the same measure of care as an ordinary passenger for hire. He has as good a right to be upon the train as the ordinary passenger, and his life is just as valuable. The moral duty to exercise care to avoid injuring him is the same, and no valid reason exists for a distinction in the legal duty. The rule that requires the exercise of the utmost care and vigilance to guard against accident extends to every case in which a carrier receives and agrees to transport another not in its employment, whether by contract with the person to be carried or with some other person by whom the person to be carried is employed for the purpose of transacting the employer's business upon the cars or other conveyances of the carrier. In case the person so to be carried is injured through the negligence of the carrier or its servants, without his fault, his right to recover damages rests upon the same basis as that of an ordinary passenger for hire. Recoveries have been had on this basis in many other cases besides those already cited. The principle has been applied to postal clerks, express messengers, persons riding on a drover's pass, and persons permitted to conduct a business on a public conveyance by arrangement with the carrier. *Gleeson v. Virginia Midland Railway Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; *Nolton v. Western Railroad Corp.*, 15 N. Y. 44, 69 Am. Dec. 623; *Blair v. Erie Railway Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. New York, Lake Erie & Western Railroad Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Baltimore & Ohio Railroad Co. v. State*, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454; *Decker v. Chicago, Milwaukee & St. Paul Railway Co.*, 102 Minn. 99, 112 N. W. 901; *Illinois Central Railroad Co. v. Crudup*, 63 Miss. 291; *Grant v. Raleigh & Gaston Railroad Co.*, 108 N. C. 462, 13 S. E. 209; *Hammond v. Northeastern Railroad Co.*, 6 S. C. 130, 24 Am. Rep. 467; *Louisville & Nashville Railroad Co. v. Kingman (Ky.)* 35 S. W. 264; *Norfolk & Western Railroad Co. v. Shott*, 92 Va. 34, 22 S. E. 811; *Commonwealth v. Vermont & Massachusetts Railroad Co.*, 108 Mass. 7, 11 Am. Rep. 301; *Yeomans v. Contra Costa Steam Navigation Co.*, 44 Cal. 71; *New York, Chicago & St. Louis Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809; *Cavin v. Southern Pacific Co.*, 136 Fed. 592, 69 C. C. A. 366; *Railroad Co. v. Lockwood*, 17 Wall. 375, 21 L. Ed. 627; *Yarrington v. Delaware & Hudson Co.*

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(C. C.) 143 Fed. 565; Jennings v. Grand Trunk Railway Co., 15 Ont. App. 477; 3 Thompson on Negligence, §§ 2649-2651; 2 Hutchinson on Carriers, (3d. Ed.) §§ 1017, 1018.

In Pennsylvania it has been held that the right of action of a postal clerk for injuries received while being carried in the mail car is only such as would exist if he was an employee of the railroad company, and does not stand on the same footing as that of a passenger. *Pennsylvania Railroad Co. v. Price*, 96 Pa. 256; *Foreman v. Pennsylvania Railroad Co.*, 195 Pa. 499, 46 Atl. 109. But those decisions are based upon the construction of a statute of Pennsylvania. They hold that "passengers," as used in that statute, were intended to be distinguished from persons "lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee," and that postal clerks are included within the latter class as distinguished from passengers. Those cases are therefore not in conflict with the doctrine of the other cases cited.

We have held that a railroad company, in contracting with an express company for the transportation of express matter and the company's messengers in charge thereof, may require an exemption from liability for the negligence of its employees, and that a contract made by the messenger with the express company in consideration of his employment, assuming all risk of injury in the course of his employment, occasioned by the negligence of the railroad company, and releasing the railroad company from liability to him therefor, was not against public policy, but would be enforced. *Blank v. Illinois Central Railroad Co.*, 182 Ill. 332, 55 N. E. 332. The same rule has been applied to a like contract made by a sleeping car porter. *Chicago, Rock Island & Pacific Railway Co. v. Hamler*, 215 Ill. 525, 74 N. E. 705, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187. The principle on which these cases were decided is that the railroad company is not bound to receive and haul over its road express cars or sleeping cars, or to furnish to the owners of such cars facilities for carrying on their business on its railroad. It may undertake to do so; but, if it does, the undertaking is not the performance of a duty imposed by law, but is a special contract, giving rights which, as a common carrier, it could not be compelled to grant. The principle is announced in numerous decisions of other courts, but is not applicable here. There was no release of the appellant's liability, either by the appellee or by the government. Even if it be conceded that the appellant was not a common carrier as to the appellee and that the appellee was not a passenger, yet appellant was liable to the appellee for negligence to the same extent as to a passenger, and the fact that his contract to release the appellant from liability would

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have been valid is not important, unless he actually made a contract to release it. The trial court, therefore, did not err in instructing the jury as to the measure of care required of the appellant.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

GOODWIN v. CINCINNATI TRACTION CO.

(Circuit Court of Appeals, Sixth Circuit, January 18, 1910.)

[175 Fed. Rep. 61.]

Carriers—Assault by Servant—Scope of Authority—Question for Jury.—In an action for injuries to a street car passenger by being assaulted by an inspector, evidence held to require submission to the jury of the question whether the inspector was acting within the general scope of his employment at the time of his assault.

Trial—Direction of Verdict.—A case cannot be properly withdrawn from the jury because in the judgment of the court there is a preponderance of evidence in favor of the party asking a peremptory instruction, unless, on a survey of the whole evidence, and giving effect to every inference to be fairly drawn from it, the case is for the party asking the instruction.

Carriers—Injuries to Third Persons—Assault by Inspector—Master's Liability.*—The liability of a carrier for injuries to a passenger from an assault committed by an inspector depended on whether the inspector at the time of the assault was acting within the scope of his employment.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action by Charles W. H. Goodwin against the Cincinnati Traction Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Orris P. Cobb and *Oliver G. Bailey*, for plaintiff in error.

Joseph Wilby, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge. The plaintiff, Charles Goodwin, brought this suit, against the defendant, the Cincinnati Traction Company, to recover damages for injuries inflicted on him while

*See foot-note of *McKain v. Baltimore & O. R. Co.* (W. Va.), 32 R. R. R. 542, 55 Am. & Eng. R. Cas., N. S., 542.

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a passenger on defendant's street railway by one of defendant's servants. At the conclusion of all the testimony, upon motion of defendant's counsel, the court below directed a nonsuit, and taxed the costs against the plaintiff. The plaintiff duly excepted to the action of the court, and has prosecuted a writ of error to this court.

Eleven errors are assigned. At the hearing these were condensed and presented under three general heads.

The first assigned error, and the only one we deem it necessary to consider is:

"That on the merits the court erred in sustaining either a motion to direct a verdict or a motion for a nonsuit on the ground that the defendant was not liable for the assault by the inspector."

From the testimony it appears that in the early morning of April 17, 1907, the plaintiff entered one of the defendant's street cars at Forest and Harris avenues to be transported to his place of work, at or near Central avenue and Fourth street, Cincinnati, Ohio. After paying his fare to the conductor, he applied for, and was given, a transfer ticket to enable him, when the car arrived at Fifth and Vine streets, to transfer to an East End car which would carry him to or near his destination. The car that plaintiff boarded was crowded with passengers, and when it had reached a point known as Peeble's corner, at the intersection of McMillan and Gilbert avenues, they were informed by one Bresnan, an inspector of the defendant company, that that car would not go to the city, but would be turned back to Norwood, and he directed them to leave it at that point and take another car, which would carry them to the city. Bresnan, the inspector, directed the passengers, amongst them the plaintiff, to go to Sardino corner, some 50 or 60 feet from the car, and wait there, and he would see that they were taken to their destination.

While they were leaving the car, and going to the point indicated by Bresnan, where they were to catch the car on to the city, another inspector of the defendant company, Hess, by name, appeared upon the scene. The duty of these two inspectors was the same, which was, among other things, to direct the movements of the cars and passengers in such an emergency at this. After Inspector Hess appeared, both he and Bresnan were engaged in seeing that these passengers were transferred to the proper cars, and, in addition, Inspector Bresnan was aiding in switching the Norwood car so as to send it back in the direction from which it came. After the plaintiff, Goodwin, had gone to or near the place indicated by Bresnan, where he was directed to wait the car to which he was to be transferred, and while he was waiting for the car, Inspector Bresnan approached Goodwin from the rear and struck him two or three blows with a switch iron, weighing eight or nine pounds, and injured him. There is

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considerable conflict in the testimony as to what was said by the parties before and at the time of leaving the car. With that we are not, at present, concerned.

The defense is, as we understand it, that at the moment of the assault made by Inspector Bresnan he was not acting within the scope of his employment as an inspector, for the reason that he had directed the passengers where to go to make the transfer and had put them in the care of Hess, and was then engaged in switching the Norwood car back toward Norwood, and at the moment of the assault the plaintiff was under the care and direction of Inspector Hess; and hence it is insisted that the company is not liable for the assault made by Bresnan upon Goodwin. This was the view taken by the trial judge. In passing upon the motion of the defendant for a nonsuit, he said that:

"At the time of the assault, Bresnan was not acting within the scope of his employment, and that the defendant is not liable for his assault, although Bresnan personally may be so."

In allowing the motion, we think the learned trial judge erred. Under the testimony as set forth in the record, the case should have been submitted to the jury, under proper instructions by the court.

Since the case is to be tried again, we refrain from expressing any opinion as to the weight of the evidence before us, but the court is of the opinion that the evidence is not so clear and convincing as that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from it, to wit, that at the time of the assault Inspector Bresnan was not acting within the general scope of his employment.

The rule is well settled in this circuit, and generally, to be that:

"The jury should be permitted to return a verdict according to its own views of the facts, unless, upon a survey of the whole evidence, and giving effect to every inference to be fairly or reasonably drawn from it, the case is palpably for the party asking a peremptory instruction. On the other hand, a case cannot properly be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction." *Standard Life & Accident Ins. Co. v. Thornton*, 100 Fed. 582, 40 C. C. A. 564, 49 L. R. A. 116; *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Mt. Adams & E. P. Inclined Ry. Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Minahan v. Grand Trunk W. Ry. Co.*, 138 Fed. 37, 70 C. C. A. 463.

There is competent evidence tending to prove that Inspector Bresnan not only directed the transfer, and pointed out the place where the passengers should wait for the cars, but that he remained for the purpose of identifying the passengers to the

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conductor on the cars to which they were to be transferred, and to see that they were taken to their destination, and was acting within the scope of his employment at the time of the attack.

Upon the other hand, there is competent evidence tending to prove that Inspector Bresnan turned the passengers over to the care and direction of Inspector Hess and Bresnan remained only for the purpose of directing other cars, and, further, that the relation of Bresnan to the passengers so transferred as inspector had terminated, and that he was not acting within the scope of his employment at the time of the assault. Here, then, under the rule above stated, is presented a case peculiarly for the jury. The liability or nonliability of the defendant turns upon the fact as to whether or not the inspector was acting within the scope of his employment when he made the assault. How that fact is must be determined from the conflicting testimony, and this is the especial province of the jury.

The judgment of the court is reversed, and the case is remanded for a new trial.

Judge LURTON was a member of this court, and was present when this case was heard, and concurred in the conclusion reached, but before the opinion was prepared and announced he was appointed an Associate Justice of the Supreme Court of the United States.

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(Supreme Court of Montana, Jan. 29, 1910.)

[107 Pac. Rep. 87.]

Pleading—Demurrer—Joint Demurrer.—A joint demurrer to a complaint by several defendants was properly overruled where the complaint stated a cause of action against some of them.

Pleading—Reply—Necessity to Deny Defenses in Answer.—Under Rev. Codes, § 6540, providing that an answer must consist of two parts, the first embodying the admissions and denials, and the second new matter constituting a defense or counterclaim, and Rev. Codes, § 6560, requiring a reply only when the answer contains new matter which constitutes a defense or counterclaim, in an action for assault by employees of a street railroad company, an allegation in the answer that defendants are not liable, as the alleged employees were not in the employ of the company, and were there acting as peace officers only, was simply an argumentative denial of the portion of the complaint relating to this matter, and need not be denied in the reply.

Pleading — Reply — Necessity to Deny Defenses in Answer. — It cannot be claimed that matters of defense set out in the answer are

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admitted, where the same matters, alleged in connection with other facts in a special defense, are denied.

Assault and Battery—Civil Liability—Public Officers.—In an action for assault, the fact that the persons assaulting were acting as public officers at the time is no justification, since a public officer has no right because he is such to use violence toward a citizen, even when in the discharge of his duty, except when the character of the duty requires it.

Assault and Battery—Judgment—Actions—Parties.—In an action for injuries by an unlawful assault in which all the defendants participated, plaintiff has a right to proceed against any one or all, and to have judgment against any or all of them, and where he proceeds against all in the same action, but fails to connect any one or more with the wrongful act, his right to recover as against the others is not thereby impaired.

Carriers—Passengers—Actions—Evidence.—In an action for assault by persons in the employ of defendant's street railway company, evidence that the persons committing the assault were appointed special deputies by the sheriff at the request of the company was material only in so far as it tended to show their employment by the company.

Appeal and Error—Harmless Error—Admission of Evidence.—In an action for assault by persons in the employ of defendant street railway company, the admission of evidence that the persons committing the assault were appointed special deputy sheriffs at the request of the company cannot be objected to by the defendants, where the same facts were subsequently proven or admitted by them.

Trial—Instructions.—In an action for assault, where the court undertook to state to the jury the issues made by the pleadings, and stated, first, substantially the allegations of the complaint, and then only that defendants deny certain of these allegations, without specifying them, the instruction was insufficient, since where the court undertakes to define the issues his statement should be complete.

Trial—Instructions—Defining Terms—Necessity—Civil Liability.—In an action for assault, it is not error for the court in its charge to use the expression "preponderance of evidence" without defining it.

Carriers—Carriage of Passengers—Liability for Assault on Passenger.—In an action for assault on a passenger, instructions stating who are passengers and the duty of the carrier toward them, and the measure of damages for the breach of this duty, were not erroneous as submitting the case on two different theories; the one that it is an action for tort, and the other, for the breach of the contract.

Trial—Instructions—Defining Terms—Necessity—Civil Liability.—In an action for assault, it is not error for the court to fail to define the expression "the direct and proximate result" used in its charge.

Carriers—Carriage of Passengers—Assault on Passenger.—In an action for assault by employees of a street railway company, where

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the court in its charge fully defined the relation of the defendant company to a passenger, and the duty imposed by law as growing out of this relation, and in proper terms left it to the jury to determine whether the employees were acting for the company at the time, and that if they were acting as peace officers, and, in view of the behavior of the plaintiff, they were required in order to preserve peace to take him into custody, and they did so, using no more force than was necessary, plaintiff could not recover, and, further, that it was the duty of the employees of the company to protect other passengers from such acts as it was claimed that plaintiff was guilty of, and eject him from the premises if necessary, it was not error to instruct that if the plaintiff had been assaulted in the manner alleged, and that he sustained damages thereby, it was the duty of the jury to assess his damages at such sum as they thought he was entitled to, considering character of the injury sustained, and the attendant humiliation, pain, and suffering.

Master and Servant—Master's Liability for Acts of Servant.*—

Where an employee is made a special officer, the employer is liable for his acts during the course of his duty, even though they are done in excess of his authority.

Assault and Battery—Civil Liability—Persons Liable.—Where parties acting either as special police officers or employees of a street railway company used more force than was necessary in ejecting a person from the company's premises they are liable.

Carriers—Carriage of Passengers—Liability for Assault on Passenger—Question for Jury.—In an action for assault of a passenger held, under the evidence, that the question whether the parties assaulting were acting as public officers or as officers of the street railway company was for the jury.

Assault and Battery—Excessive Damages to Person.—Where plaintiff was seized without cause in a public place and beaten and roughly handled so that his head and face were badly cut and bruised, his nose broken, and he was confined to his bed under the care of a physician for several weeks, a verdict of \$2,500 was not excessive.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by R. N. Rand against the Butte Electric Railway Company and others. From a judgment for plaintiff and an order denying defendants' motion for a new trial, they appeal. Affirmed.

W. M. Bickford and George F. Shelton, for appellants.
Mackel & Mcyer, for respondent.

*See foot-note of *McKain v. Baltimore & O. R. Co.* (W. Va.), 32 R. R. R. 542, 55 Am. & Eng. R. Cas., N. S., 542; foot-note of *Chicago, etc., Ry. Co. v. Nelson* (Ark.), 31 R. R. R. 785, 54 Am. & Eng. R. Cas., N. S., 785.

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BRANTLY, C. J. Action for damages for personal injuries alleged to have been suffered by plaintiff by an assault upon him by defendants Wharton, McDonald, and Vivian, employees of defendants W. A. Clark and the Butte Electric Railway Company, hereinafter referred to as the company, while acting within the scope of their employment. The facts alleged in the complaint about which there is no dispute are the following: The company owns and operates a street railway in the city of Butte which extends about two miles from the city to a pleasure resort known as the "Columbia Gardens." It also owns, controls, and maintains this resort, its purpose in so doing being to secure profit from the attendance upon the resort by the public, to witness ball games, etc., had there, and from the increase in the number of its passengers to and fro from the city. For the accommodation and convenience of its patrons in getting off and on the cars at the Gardens, the company maintains a depot and platforms, which also serve as a waiting place for passengers when about to take cars for return to the city. Defendant Wharton was at the time of the alleged assault the general manager of the company, and as such had the management and control of the Gardens. On November 16, 1907, there was a football game played at the Gardens. It had theretofore been advertised, and an invitation to attend extended to the public generally, with the knowledge and acquiescence of the defendants. A great number of people attended, all being conveyed thither as passengers on the defendant company's railway, and expecting to return by the same means. Among those who so attended was the plaintiff. It is then alleged that the Gardens were owned and controlled jointly by the company and W. A. Clark, and that the defendant Wharton was in the joint employ of the company and the said W. A. Clark. The facts connected with the alleged assault are stated in the complaint as follows: "(9) That for a long time prior to the 16th day of November, 1907, and especially on the said day, the defendants Butte Electric Railway Company and W. A. Clark employed the defendants McDonald and Vivian, for the purpose of assisting in handling the crowds and patrons who attended the said Columbia Gardens and the said football game, and especially to take care, and assist in taking care, of the crowds and patrons when the said crowds and patrons went to the said depot and platform for the purpose of leaving the said Gardens and while waiting there, and returning to the said city of Butte. (10) That on the said 16th day of November, 1907, this plaintiff became a passenger upon the cars of the defendant railway company, paid his fare into and attended the aforesaid football game, and that at the close of the said game this plaintiff, in company with the rest of the crowd, went to the aforesaid platform and depot for the purpose of and with the intention of leaving the said Gar-

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dens and returning to the said city of Butte upon the cars of the said defendant railway company, and that he then and there became and was entitled to the care and protection of a passenger. (11) That while plaintiff was on and at the said platform, and on and at the said depot and a passenger as aforesaid, the defendants McDonald and Vivian, while discharging their duty and acting within the scope of their employment, without cause or provocation, or any excuse therefor, beat, bruised, maltreated, and severely injured this plaintiff, and that all of said acts were done in the presence of, and as plaintiff is informed and believes, with the knowledge, acquiescence, and consent of the defendant Wharton." It then proceeds to set forth that as the result of the beating the plaintiff was severely and permanently injured, suffering physical pain and mental anguish and also humiliation and chargin, for all of which he claims damages in the sum of \$25,250. A joint general demurrer, interposed by the defendants' was overruled.

The defendant Wharton and the company filed a joint answer, in which, after denying that defendant Clark has or had any interest in the Columbia Gardens jointly with the company or otherwise, they substantially admit all the allegations contained in the complaint, except those embodied in paragraphs 9, 10, and 11, heretofore quoted, and those touching the injuries and suffering alleged in the subsequent paragraphs. Except as to paragraph 9, the denials are of knowledge or information sufficient to form a belief as to the matters alleged. The denials of paragraph 9 are stated as follows: "As to paragraph 9, these defendants aver: That prior to the 16th day of November, 1907, the defendants Frank C. McDonald and Morton M. Vivian had been, and on said 16th day of November, 1907, were, regularly and duly appointed, qualified, and acting deputy sheriffs of Silver Bow county, state of Montana, and as such deputy sheriffs were peace officers, authorized by law to preserve peace and order, and to prevent violence and disorder and unseemly conduct and the commission of disorderly acts by individuals in the county of Silver Bow, state of Montana; and that for the purpose of preserving peace and order, and attending to the orderly conduct of people at said Columbia Gardens, said defendants Frank C. McDonald and Morton M. Vivian were, on the 16th day of November, 1907, present at said Columbia Gardens, and as such deputy sheriffs and peace officers were engaged in the fulfillment of their duties and functions as such at said time and place, and not otherwise were they present; nor were they engaged in any other capacity than as deputy sheriffs and peace officers, at said time and place, for the said purpose aforesaid; and these defendants deny each and every allegation of said paragraph 9 not herein expressly admitted as above set forth."

As a special defense, after alleging substantially the facts

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stated in the foregoing paragraph, the answer continues: That the plaintiff was present at Columbia Gardens on November 16, 1907; that in the presence of a large number of women and children he conducted himself in a boisterous, offensive, and disorderly manner, using foul and unseemly language to such an extent that appeals were made by persons present to the defendants McDonald and Vivian for protection from him; that these defendants thereupon for the purpose of removing him from the presence of the women and children who were offended by his conduct, sought to put him upon one of the cars of the defendant company for transportation back to the city—his destination; that he violently and offensively resisted the efforts of said officers, and, in doing so, violently struck his head against a projecting iron on the car, and in that manner, and not otherwise, was injured, if injured at all; and that, if he suffered damage, it was wholly due to his said offensive conduct and breach of the peace and his resistance to arrest by the officers while in the discharge of their duties, and not to any other cause. The answer of defendants McDonald and Vivian is a substantial repetition of that of defendants Wharton and the company. The separate answer of Clark denies all the allegations of the complaint which tend to connect him in any way with the cause of action alleged by plaintiff. The plaintiff by reply denies generally the affirmative defense alleged.

At the close of plaintiff's evidence, a separate motion for nonsuit by defendant Clark was sustained, and the action was dismissed as to him. A like motion by defendants Wharton and the company was denied. At the close of all the evidence the court was requested to direct a verdict for each of the remaining defendants. This was denied. A verdict was returned in favor of the plaintiff for \$2,500. From the judgment entered thereon, and from an order denying their motion for a new trial, the defendants, other than Clark, have appealed.

1. The first contention made is that the court erred in overruling the demurrer as to defendants Clark, Wharton, and the company. It is said that the allegations of the complaint do not show that Wharton participated in the assault in any way, it being alleged that it was committed merely with his "knowledge, acquiescence, and consent," or that defendants McDonald and Vivian were acting within the scope of any employment by the company, or in any other than in an individual capacity; and hence the court should have sustained the demurrer as to all of the defendants other than McDonald and Vivian. While there is some conflict in the decisions on the subject, it is the generally recognized rule that a joint demurrer by two or more defendants, must be overruled if the complaint states a cause of action against any one of them. *Pomeroy's Code Remedies*, § 468; *Bates' Pleading, Practice, Parties & Forms*, p. 414; *Bliss*

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on Code Pleading, § 417; 6 Ency. Pleading & Practice, p. 412. Conceding that the complaint does not state a cause of action against any of the defendants other than McDonald and Vivian, yet, since such defendants chose to make common cause with McDonald and Vivian, against whom it is now admitted that the complaint is sufficient, they cannot complain that the court did not decide a question other than the one which their demurrer presented, viz., whether under the statement of facts any one of them is liable.

2. At the opening of the trial, after a witness had answered the usual preliminary questions, objection was made to the introduction of evidence in support of the allegations of the complaint, on the ground that, inasmuch as the denials in the replication respond only to the allegations of fact set forth in the affirmative defense, the facts stated in the answer in response to paragraph 9 of the complaint, stand admitted, and therefore constitute a complete defense to the action; for, counsel say, if McDonald and Vivian were acting within the scope of their duty, as charged in the complaint, and were present as peace officers and engaged in keeping the peace, as is alleged in this uncontroverted portion of the answer, they are not individually liable; nor are the other defendants liable, because it thus appears that they were not in the employ of the other defendants. In any event, counsel say, these admitted facts exclude any inference of liability on the part of the other defendants. There is no merit in this contention. Under the statute, the answer must consist of two parts, the first embodying the admissions and denials, and the second, new matter constituting a defense or counterclaim. Rev. Codes, § 6540. A reply is required only when the answer contains new matter which constitutes a defense or counterclaim, stated as such. Rev. Codes, § 6560. Instead of contenting themselves with the denial that McDonald and Vivian were employees of Clark and the company, the defendants undertake to allege facts showing that neither they nor the other defendants are liable, because they were present and acting in the discharge of their duties as public officers, and not otherwise. If it was a fact that McDonald and Vivian were not in the employment of the company, the company could not be held liable, no matter in what capacity they acted. Nor could Wharton be held liable unless he personally participated in the assault. Therefore, so far as they are concerned, the portion of the answer in question is an argument setting forth the reason why the defendants should not be held liable, and is, what is termed in the books, an argumentative denial of the portion of the complaint at which it was directed, and amounts to nothing more than a denial. Pomeroy's Code Remedies, § 515. *et seq.*; Bates' Pleading, Practice, Parties & Forms, p. 342; 1 Ency. Pleading & Practice, 799. Furthermore, the same mat-

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ter alleged in connection with the other facts in the special defense, is denied. Hence it cannot be maintained that it is admitted. If it is a fact that plaintiff was assaulted and beaten by defendants McDonald and Vivian, without provocation or excuse, the fact that they were acting as public officers at the time is no justification. A public officer has no right because he is such, to use violence toward a citizen, even when in the discharge of his duty, except when the character of the duty requires it, and even then he must go no further than the circumstances demand. So that, if the facts alleged in this behalf should be deemed admitted by the replication, they would not constitute a justification or excuse for their wrongful acts.

3. It is argued that since the complaint proceeds upon the theory that defendants Clark and the company jointly owned and controlled the railway and the Gardens, and jointly employed the defendants McDonald and Vivian, and the evidence fails to show any liability on the part of Clark, or, in other words, any joint liability on the part of Clark and the company, it was error to deny the motion for nonsuit as to the company and its manager Wharton. In actions for personal injuries occasioned by an act in which all the defendants participated, the plaintiff has a right to proceed against any one of the participants, or all of them, and is entitled to judgment against any one or all by whose concurrent act the alleged wrong was done. *Golden v. Northern Pacific Ry. Co.*, 39 Mont. 134, 104 Pac. 549. So, if he proceeds against all in the same action, but fails to connect any one or more with the wrongful act, his right to recover as against the others is not thereby impaired. The case of *Forsell v. Pittsburgh & Montana Co.*, 38 Mont. 403, 100 Pac. 218, cited by counsel for defendants, is not in point, either by its similarity in point of fact, or in the principle involved. In that case the complaint alleged separate and distinct acts of negligence by the different defendants, by the concurrence of which the injury was done, but without either of which there would have been no injury. Necessarily this required proof of both concurrent acts, or a recovery could not be had. Here a single act was done for which it is sought to hold all the alleged participants liable.

4. Evidence was admitted as a part of plaintiff's case in chief that McDonald and Vivian had appointments as special deputies by the sheriff of Silver Bow county, made at the request of the company, through the manager, Wharton, so that they could make arrests when occasion demanded, and that they were paid by the company. Defendants objected that it was immaterial; and it is argued that its admission was prejudicial error, because it is alleged and admitted in the pleadings that they were special deputies, and, being such, it was wholly immaterial at whose instance they had been appointed or who paid them for their serv-

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ices. It was not material to plaintiff's case to show that they were special deputies, or that they were paid as such by the company. To connect them with the company and show its responsibility for their acts, it was only necessary for the plaintiff to show that they were employed by the company in the capacity of trainmen and worked as such. In so far as the evidence tended to show that they were also public officers, it was, at the time it was introduced, immaterial; but, in so far as it tended to show an employment by the company, it was pertinent and material, because, under the operation of the maxim *respondeat superior*, it tended to show the relation of master and servant between them and the company, and hence to fasten liability upon the company. In any event, the fact of their appointment, and their employment and payment by the company, was subsequently proven or admitted by the defendants; therefore, even though it be conceded that it was error to admit the evidence in the first instance, such error was cured by its subsequent admission.

5. In the first paragraph of the charge, the court undertook to state to the jury the issues made by the pleadings. The first part of the paragraph states substantially the allegations contained in the complaint. It then proceeds: "The defendants deny certain of these allegations, and further set up a defense that, while plaintiff was at said place, he conducted himself at said time and place, in the presence of a large number of women and children, in a boisterous, offensive, and disorderly manner; that he used at said time and place foul and unseemly language, and was so offensive in his manner, conduct, and language that the said Vivian and McDonald, who it is alleged were deputy sheriffs, removed the plaintiff and sought to place him on board of one of the defendant railway company's cars. You are instructed that the burden of proof is on the plaintiff, and the plaintiff must prove by a preponderance of the evidence all the allegations of his complaint denied by the defendants."

Complaint is made that this portion of the charge was prejudicially erroneous, in that it failed to point out to the jury what allegations in the complaint were put in issue by the answer, thus omitting to state definitely what issues were actually to be tried. In *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416, it was said: "While the jury may be permitted to take with them to the jury room the pleadings in the case and study the issues for themselves, the practice of setting forth in the instructions a clear and concise statement of the nature of the case and the issues to be determined is to be commended." This course would seem to be the better one; for it is often difficult for the trial judge to make a clear definition of the issues, and for this very reason, if for no other, it ought not to be left to the jury to ascertain them from an examination

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of the pleadings or from the controversy in the evidence, and the statements of counsel during the trial. And if the court undertakes to include in its charge a definition of them, the statement should be definite and complete. 1 Ency. Pl. & Pr. 155, 156, and notes. Testing the foregoing paragraph of the instruction by this rule, it is clearly insufficient, for the reasons stated by counsel; and, if it were the only guide which the jury had before them, it would warrant the granting of a new trial. When we examine the rest of the charge, however, we cannot see how the jury could have misunderstood the issues submitted to them. It was the theory of counsel for plaintiff that he was entitled to recover upon a showing that he was, at the time of the assault, a passenger of defendant company; that the defendants McDonald and Vivian were in its employ; that Wharton was the general manager of its business; and that Wharton and McDonald and Vivian all participated in the maltreatment of the plaintiff, without cause or excuse, while they were acting for the company. The fact that the defendants McDonald and Vivian held appointments from the sheriff as special deputies, they insisted, was not conclusive of the right of their client to recover as against the company, but that he was still entitled to recover, as against it, if upon the evidence as a whole it appeared that at the time the wrong was done McDonald and Vivian were acting for it, and that Wharton participated in the wrong. The theory of defendants was that McDonald and Vivian were public officers, and that the company was not liable for their acts, and hence that Wharton could not be held responsible unless the deputies, in undertaking to eject the plaintiff from the Gardens by forcibly putting him on the car for his return to the city, used more force than was necessary, and that he directed and aided them. We shall not undertake to review the charge as a whole in order to point out the particular paragraphs which define the issues. We content ourselves with the general statement that it was so formulated as to submit the cause fully and fairly upon all the issues—in fact, so fully and fairly that we cannot see how the jury could have been mistaken as to their duty under it.

Complaint is also made that the court erred in failing to define the expression "preponderance of the evidence," used in paragraph 2 of the charge; and counsel cite *Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958, and *First National Bank v. Carroll*, 35 Mont. 302, 88 Pac. 1012, as authority in support of their contention that the omission constitutes reversible error. In the former of these cases it was held that in an action for damages for personal injuries a requested instruction, defining the expression "proximate cause," should have been given. In the latter, which was an action for damages for a breach of contract, it was held that such terms as "actual,"

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"remote," and "speculative," as applied to the term "damages," should have been defined, so that the jury would have a safe guide in ascertaining the amount of their verdict. In neither case was it held reversible error to fail to define such terms, in the absence of a specific objection and a request by counsel with tender of an instruction embodying the desired statement. And this court has repeatedly held that where an instruction is indefinite or not sufficiently specific, but correct as far as it goes, the judgment will not be reversed and a new trial ordered on account of it, unless at the time of the ruling counsel formulated and submitted to the court an instruction drawn in conformity with their wishes, with the request that it be given. *Mulligan v. Montana Union Ry. Co.*, 19 Mont. 135, 47 Pac. 795; *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713; *State v. Broadbent*, 19 Mont. 467, 48 Pac. 775. Furthermore, the terms "actual," "remote," and "speculative," and the expression "proximate cause," as used in the cases cited, are technical and difficult to understand and apply, even by persons more or less learned in the law, whereas the expression "preponderance of the evidence," is of frequent use in common speech, and its meaning and application may be said to be understood by the man of average intelligence and experience. It therefore may be left to the trial judge to determine whether a particular jury is composed of men whose intelligence may or may not require a special definition of this and like expressions which are in common use.

In paragraphs 3 and 4 of its charge, the court instructed the jury, in substance, that when one enters upon the depot grounds of a common carrier by the usual means of access thereto, with the intention in good faith to take passage on a car, he is a passenger, whether he has actually paid his fare or not; that where the carrier conducts its or his business through agents, servants, and employees, the duty of protection must be discharged by such agents, servants, and employees; and that if any agent, servant, or employee, while in the discharge of his duty assaults a passenger or otherwise violates the right of protection to which he is entitled, the carrier is liable for the injury so done. Paragraph 7 is as follows: "You are instructed that for the breach of an obligation, not arising from contract, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." That these are correct statements of law, counsel do not question. It is argued, however, that paragraphs 3 and 4 are based upon the theory that the action is one for breach of the contract between the plaintiff, as a passenger, and defendant company, as a carrier; while paragraph 7 is based upon the theory that the action is one for damages for a tort, and hence that the court confused the jury by adopting the two

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inconsistent theories. There is no merit in this contention. If the plaintiff had not become a passenger, the defendant company owed him no duty during his presence upon its premises; nor did its servants or employees owe him any duty, other than to abstain from inflicting upon him willful or wanton injury. If he had become a passenger, then the duty of protection was imposed by law, as incidental to the contract. Redress for any wrong done him by defendant company or its servants could be had by him either by action for damages for breach of the contract of carriage, or in tort for the omission of the incidental legal duty of protection. *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642. The cause of action stated in the complaint is for the wrong done, and not for a breach of the contract. Paragraphs 3 and 4 correctly state how the relation of carrier and passenger may be established, and the resultant legal duty; while paragraph 7 lays down the rule as to the measure of damages prescribed by the Code (Rev. Code, § 6068.)

It is also said that paragraph 7 is prejudicially erroneous in that neither in it, nor elsewhere, did the court define the expression "the direct and proximate result." What has heretofore been said with reference to paragraph 2 of the charge, disposes of this contention.

In paragraph 6 the court instructed the jury that if they found from the evidence that the plaintiff had been assaulted and beaten in the manner and form charged in the complaint, and that he sustained damage thereby, it was their duty to assess his damages at such sum as they thought he was entitled to, basing their estimate upon the character of the injury sustained by him, as shown by the evidence, and the attendant humiliation, pain, and suffering. It is said that this statement leaves out of consideration the question whether there was justification for the acts of McDonald and Vivian, as alleged in the answer and which they attempted to sustain by the evidence adduced in that behalf, and amounts to a peremptory instruction to find for the plaintiff, whether he was in the wrong or not. In other parts of the charge, as already pointed out, the court defined fully the relation of defendant company to a passenger and the duty toward him imposed by law as growing out of this relation. It likewise in proper terms left it to the jury to determine whether McDonald and Vivian were acting for the company at the time of the assault, and whether Wharton participated in it in any measure. It told the jury clearly and specifically that if McDonald and Vivian were acting as peace officers, and in view of the behavior of the plaintiff they were required as such, in order to preserve the peace, to take him into custody and eject him from the premises, and they did so, using no more force than was necessary, plaintiff could not recover from any of the defendants. It also further

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told the jury that it was the duty of the employees of the company, having in charge the conduct of its business, to protect the other passengers from such acts as it was charged the plaintiff was guilty of, and in case he refused to desist when warned, to eject the offender from the premises, using such force as was necessary. In view of these instructions, and the fact that the court, in giving the paragraph complained of, was stating to the jury what elements they should consider in estimating the amount of damages they should award to plaintiff in case they found that he should recover, the objection urged to this instruction is entirely without merit.

6. The contention is made that the evidence is insufficient to sustain the verdict against the company, and that the court erred in refusing to direct a verdict in its favor. This contention is based upon the assumption that McDonald and Vivian were peace officers in the discharge of their duty, and that the company could not, under the circumstances and for this reason alone, be held liable for their conduct, whether they used more force in taking the plaintiff into custody and putting him on board the outgoing car, or not. The motion for a new trial in the district court was made jointly by all the defendants. The order denying it was general. The appeal was taken jointly. Under such circumstances we are not inclined to sustain a party who assumes a position in this court antagonistic toward the other appellants. *Anderson v. Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884. But waiving aside this consideration, we do not think that the facts presented in the evidence justified the trial court in assuming, as a matter of law that the company was not responsible for the acts of McDonald and Vivian. If they used more force than was necessary, and injury resulted, they were liable. So was Wharton, if he acted with them; and this without reference to the connection of any of them with the company. The jury evidently found the issue on this point against them. They were all regularly employed by the company and were engaged in the conduct of its business. McDonald and Vivian were not regular deputies. The evidence shows beyond question that they were made deputies so that they would be able to enforce order by a show of legal authority while engaged in the discharge of their ordinary duties as employees of the company. It justifies the finding that at the time they put the plaintiff on the car they were acting under the direct orders of Wharton. We understand the rule of law to be that a public officer cannot engage as such to guard the property of a private individual or corporation, and that the latter cannot claim freedom from liability for his wrongful acts while engaged as its trainman or in other like capacity, on the ground that he is a public officer. If the wrong was done by the officer as such, his employer is not liable even if he exceeds his au-

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thority; but if it is done during the course of his duty as employee, then the employer is liable even if it is done in excess of authority; and it is generally a question for the jury to determine, upon all the evidence, the capacity in which the wrongdoer was acting at the particular time. This rule finds support in the following authorities: *St. Louis, etc., Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; *Brill v. Eddy*, 115 Mo. 597, 22 S. W. 488; *Krulevitz v. Eastern Railroad Co.*, 143 Mass. 228, 9 N. E. 613; *Hirst v. Fitchburg & L. St. Ry. Co.*, 196 Mass. 353, 82 N. E. 10; *Duggan v. Baltimore & Ohio R. R. Co.*, 159 Pa. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672; *Gillingham v. Ohio River R. R. Co.*, 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827; *Dwinelle v. New York Cent. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440. "It is no uncommon thing for corporations and individuals to employ duly appointed police officers to watch their property; and if such an officer so employed make an arrest for disorderly conduct, the presumption is that he acted in his official capacity as the agent of the state, and not as the agent of his employer. Being an officer whose duties are prescribed by law, it should be presumed, until the contrary is made to appear, that his employment contemplates only the exercise of such powers as the law confers upon him. * * * The presumption is, however, one of fact, and it may be shown that in making the arrest he acted under orders of his employer, in which event the employer would be liable for the unlawful act of the officer." *Brill v. Eddy, supra*.

From the evidence it appears that when the game was over, and the people assembled at the platform of the company to take the outgoing cars, there was a great deal of pushing in the crowd to catch the first outgoing cars. Complaint was made by some one that plaintiff was doing some of the pushing and was using obscene and profane language. There is room for question whether the plaintiff was pushing intentionally, or whether he was himself being pushed by others behind him. There is some evidence tending to show that he was intoxicated. That he was in this condition or was using unseemly language is controverted. McDonald and Vivian, acting upon the supposition that he was intoxicated, took him out of the crowd and across the track to another platform where there were fewer people, intending, as they testified, to hold him there until the crowd had thinned out somewhat and then to send him to the city. It does not appear whether they intended to file charges against him or whether they intended to release him. It is stated by some of the witnesses that while they had him in charge, they beat him with their canes or billies, to such an

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extent as to call forth remonstrances from some of the persons who were looking on. In any event, the plaintiff struggled to get free from them. Wharton was present looking after the coming and going cars. Finally the plaintiff broke away and started down the track, saying that he was going to see Wharton, presumably for the purpose of making complaint to him of the conduct of McDonald and Vivian. When he finally reached the presence of Wharton, the latter said that he had no time to talk to a drunken man and ordered McDonald and Vivian to put him upon an outgoing car in charge of a policeman, with directions to the latter to see that he reached the city, and to release him when he did so. Some of the witnesses testified that Wharton assisted McDonald and Vivian in putting plaintiff on the car, some one of them kicking him from behind as they proceeded toward it. The evidence is somewhat in confusion, leaving it in doubt whether the injuries received by plaintiff were the result of the beating by McDonald and Vivian, or of the rough handling by them and Wharton as they were conducting him to the car and putting him on board. There is no question that when he was finally put on board and in charge of the policeman, he had several cuts and bruises upon his face and head and his nose badly broken, in which condition he was conducted to the city and released. His wounds were dressed by his own physician, who then sent him home, where he was confined to his bed under medical treatment for several weeks. The evidence as to what occurred is exceedingly conflicting in all of its material aspects, except as to the fact that McDonald and Vivian actually took plaintiff in charge and held him until they were directed by Wharton to put him on board the car, and as to the character and extent of the injuries he suffered.

Under the rule heretofore stated, we think it was a question for the jury to say whether McDonald and Vivian were acting as public officers, or under the orders of Wharton, as employees of the company. If the plaintiff was guilty of the conduct ascribed to him by the defendants, he was guilty of a misdemeanor, under the statute (Rev. Codes, § 8577), and was subject to arrest by any officer who was present, even without a warrant (Id. § 9075). But, even so, no more force could be used than was necessary to accomplish this purpose; and it was for the jury to ascertain what the facts were.

7. It is contended that the verdict is grossly excessive. With this contention we do not agree. Taking the testimony of the plaintiff and his witnesses as true, as the jury found, the plaintiff was arrested without fault on his part, and seriously injured by the beating and rough treatment to which he was subjected. Under these circumstances the award of the jury

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evinces a spirit of conservatism, rather than of passion and prejudice.

Of the several other assignments urged by counsel, we find none of sufficient merit to demand special notice.

The judgment and order are affirmed.

Affirmed.

SMITH and HOLLOWAY, JJ., concur.

• **CREDLE v. NORFOLK & S. R. Co.**

(Supreme Court of North Carolina, Sept. 22, 1909.)

[65 S. E. Rep. 604.]

Carriers—Railroads—Personal Injuries—Setting Down Passengers—Duty to Provide Safe Place for Alighting.—A railroad which for many years allowed passengers to board and alight from trains at an unlighted coal chute near the track, the conductors receiving fares from those boarding there, was negligent in not maintaining a railing across the mouth of the chute to keep passengers from falling into it.

Appeal from Superior Court, Craven County; Cooke, Judge.

Action by James K. Credle against the Norfolk & Southern Railroad Company. Judgment for plaintiff, and defendant appeals. No error.

Moore & Dunn, for appellant.

Simmons, Ward & Allen and *D. L. Ward*, for appellee.

CLARK, C. J. The train stopped at the coal chute a short distance before getting to New Bern, as was its custom. The plaintiff got off there, as his house was close by. He testified that he had been in the habit of doing so without objection by the railroad authorities ever since he had been living there—some three years. The chute was in town limits about three blocks from the station. It was not a station, but the uncontradicted evidence was that for years people in that part of town had been getting on and off at that point without objection or hindrance from the railroad officials, and that, while no tickets were sold there, the conductors would collect the fare. Several well-beaten paths or streets lead to the railroad at the chute. When the train stopped there on this occasion, the plaintiff got off on the side next to his house. There was a string of cars on the other side. It was very dark, and at that time the defendant had no lights there. The chute was close beside the track—the defendant's witness says seven feet four

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inches from the chute to the center of the track. The chute was 17½ feet wide, 31 feet long, and 75 feet high. The defendant's witness says it was "perfectly practical to have put a rail there" which would have "kept the plaintiff from falling in." The plaintiff testified that he was proceeding cautiously, but had not taken more than two or three steps after he got off the train before he fell in the chute, and was injured by falling some 15 feet down the chute.

There are several exceptions, but, in effect, there is but one, which is that there was no evidence of negligence to submit the case to the jury. We think his honor properly held that there was. It is not altogether unusual in the suburbs of a town for the engine to stop at a coal chute or water tank, and for people in that part of the town to get on and off at such place for their own convenience. Johnson street in Raleigh is a well-known instance. When the railroad for a long series of years has permitted such practice as has been here testified, it was negligence not to put a railing across the mouth of the chute alongside the track, as defendant's conductor testified was "perfectly practical" to keep persons from falling into the chute, especially when, as here, the night was dark and the defendant had no light there. The conductor testified that passengers were in the habit of getting on and off at that point, and that he took the money of those getting on. Such conduct amounted to an invitation to get off there, especially as the conductor did not warn the plaintiff. *Johnson v. Railroad*, 130 N. C. 488, 41 S. E. 794.

The court correctly charged, among other things: "If it had been the custom for a considerable time for persons in the neighborhood of the coal chute wishing to become passengers on the outgoing trains of the defendant to enter upon the same, when they stopped at the coal chute without tickets, and to pay the fares in money which were accepted by a conductor without objection, and that it had also been the custom for them to leave the trains on their return when the trains stopped at the said coal chute and of which the agent of the defendant operating the said trains had notice, then the said passengers alighting from said train would have the license to be upon the lands of the defendant, and, if they and others had habitually used ways and paths across the lands of the defendant for the purpose of coming to or going from such trains, then there would be a license for them to do so, but, if these facts did not exist, then one getting off the trains at that point and going on the lands of the defendant would be a trespasser." *Troy v. Railroad*, 99 N. C. 306, 6 S. E. 77, 6 Am. St. Rep. 521; *Bradley v. Railroad*, 126 N. C. 735, 36 S. E. 181; *Emery v. Railroad*, 102 N. C. 235, 10 S. E. 141. Another case in point is *Ray v. Railroad*, 141 N. C. 84, 53 S. E. 622, which holds that such usage would make

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the plaintiff a licensee and the defendant would be liable for its negligence. A case exactly in point is *Hulbert v. Railroad*, 40 N. Y. 146, which is so fully stated that we need only to refer to it. It is there held that: "Wherever passengers are accustomed to be received on a train, whether at the station house, at the water tank, or elsewhere, railroad companies are bound to keep in a safe condition for transit the ordinary space in which passengers go to and from the train, and the latter have the right to assume that the ground adjacent to the cars within the limits in which persons necessarily and naturally go to and from them admits of their getting safely out, and in, even in a dark night." The jury found that the defendant was guilty of negligence and that the plaintiff was not guilty of contributory negligence. There was evidence justifying the submission of these issues, and we find they were submitted under proper instructions from the court.

No error.

ILLINOIS CENT. R. CO. v. POSTON.

(Court of Appeals of Kentucky, Feb. 24, 1910.)

[125 S. W. Rep. 253.]

Appeal and Error—Harmless Error—Continuance—Denial.—Denial of a continuance for absence of witnesses was not prejudicial to defendant, where the affidavits of the witnesses' expected testimony were read as their depositions, and plaintiff admitted that each of the witnesses would so testify if present.

Damages—Reduction of Damages—Duty of Plaintiff.*—Where a passenger is left at a flag station by the train's failure to stop though duly flagged, it is the passenger's duty to exercise ordinary care to procure comfortable lodgings at or near the station, and avoid unnecessary exposure to danger of injury which might follow an attempt to go some distance from the station, and thus minimize the damages.

Damages—Duty of Plaintiff—Ordinary Prudence.—Where a female passenger went to a flag station at night, purchased a ticket and the train was flagged, but did not stop, and she was required to obtain shelter for the night, ordinary prudence did not require that she should spend the night in a house occupied only by a single man.

Damages—Personal Injuries—Increasing Damage.—Where a female passenger, after being at a station at night, fell through a cattle guard and so injured herself that she suffered a miscarriage, and her failure to follow the advice of her physician to remain at home after her

*See second foot-note of *Campbell v. Seaboard A. L. Ry. (S. Car.)*, 33 R. R. R. 230, 56 Am. & Eng. R. Cas., N. S., 230.

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accident and keep quiet had nothing to do with her miscarriage, there was no basis for an instruction that if she failed to use care to arrest and prevent a miscarriage, and it resulted from such failure, she could not recover.

Appeal from Circuit Court, Christian County.
 "Not to be officially reported."

Action by Mollie Poston against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Trimble & Bell, Trabue, Doolan & Cox, Blcwett Lee, and Douglas & Bell, for appellant.

Hanberry & Fowler, for appellee.

CARROLL, J. The appellee, a colored school teacher, on the evening of December 6, 1907, in company with her sister went to Thompsonville, a flag station of the appellant railroad company, for the purpose of riding to Hopkinsville on its passenger train which was due there at 7:40 p. m. They purchased tickets and were on the platform ready to take passage on the train when it stopped, but the train, although the evidence shows it was flagged in the usual way, failed to stop. After the train passed, the agent returned to appellee and her sister the money they had paid for the tickets and they then walked back to the place from which they had come to the depot, a distance of some three miles and a half, getting there about 10 o'clock at night.

In her petition to recover damages for the failure of the train to stop, she alleged that "she was left at the station, and for the purpose of securing shelter for the night was forced to walk a distance of about five miles to the place where she had been visiting in order to find shelter for the night; that the night was dark and cold, and the roads were muddy and rough, and in consequence of the long walk over said rough and muddy roads through the night under the existing circumstances she was permanently injured and greatly damaged. She stated that at the time she was pregnant with child, and caused to suffer great exposure, by reason of which she was made to miscarry." The answer was a traverse of the averments of the petition and a plea of contributory negligence. Upon the trial a jury assessed the damages in favor of appellee at \$325. The appellant asks a reversal of the judgment entered upon this verdict upon the grounds that (1) the court refused to grant a continuance; (2) the verdict is not sustained by sufficient evidence; and (3) the instructions are erroneous. A continuance was asked on account of the absence of Sallee and Gray, witnesses for appellant. The affidavit set out that Sallee would say that appellee could have secured a place in the immediate vicinity of the station

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to have spent the night, but that she refused to accept an invitation from one James Dunlop, of color; and by Gray, superintendent of schools in Christian county, that appellee taught school without interruption from December 6th, the date of her injuries, until January 15th. These affidavits were read as the depositions of the absent witnesses, and it does not appear that the appellant was at all prejudiced by the failure of the court to continue the case in order to obtain their presence. Appellee did not dispute, but on the contrary admitted, 'what it is averred each of them would testify to if present.

The evidence for appellee established that she made a diligent but unsuccessful effort to secure a place to spend the night at Thompsonville. She admitted that Dunlop invited her to stay at his house, but she declined to do so because he was a single man living there by himself. It was clearly shown that the fright and exposure, accompanied as it was by an injury received in falling through a cattle guard produced the miscarriage. Nor can there be any doubt from the evidence that the inconvenience and suffering, as well as the miscarriage was proximately due to the negligence of the appellant company in failing to stop its train at Thompsonville. And so the evidence was amply sufficient to support the verdict.

The principal error assigned is the refusal to give these instructions requested by appellant: "(1) The court instructs the jury that, after the departure of defendant's train on the occasion in controversy, it was plaintiff's duty to use ordinary care to obtain shelter and accommodation for the night if such shelter and accommodation could reasonably have been obtained, * * * and if she failed to use such care in obtaining such shelter and accommodation for the night, * * * as a person of ordinary prudence would have exercised under similar circumstances, then the law is for the defendant, and the jury should so find. (2) The court instructs the jury that although they may believe the plaintiff sustained injuries on her walk home on the night of December 6, 1907, yet it was her duty thereafter to use ordinary care to arrest the miscarriage with which she was threatened, if any, and to prevent same; and if she failed to use care to arrest and prevent a miscarriage, and the miscarriage resulted from such failure to exercise such care, then and in that event she cannot recover of the defendant therefor."

We have held in a number of cases that it is the duty of a person situated as appellee was when the train failed to stop at Thompsonville to exercise ordinary care to procure comfortable lodging at or in the vicinity of the station, and thus avoid the unnecessary exposure or danger that might follow the attempt to go some distance from the station. Or, in other words, that it is the duty of a person so situated to minimize as much as is

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reasonable the damages. *Cain v. L. & N. R. Co.*, 84 S. W. 583, 27 Ky. Law Rep. 201; *C. & O. Ry. Co. v. Lynch*, 89 S. W. 517, 28 Ky. Law Rep. 467; *L. & N. R. Co. v. Daugherty*, 108 S. W. 336, 32 Ky. Law Rep. 1392, 15 L. R. A. (N. S.) 740. And so the offered instruction, or one presenting this theory of the defense should have been given if there had been any evidence upon which to base it. But the uncontradicted evidence is to the effect that appellee did make such effort as a person of ordinary prudence should have made to obtain a place to stop for the night at or near the station. That she did not succeed in doing so was not her fault. Ordinary care did not require that she should spend the night in the house occupied only by a single man. Therefore, as there was no evidence upon which to predicate the instruction, it was not error to refuse it.

In respect to the miscarriage, the testimony is that although appellee was advised by her physician at Hopkinsville, to which she returned on the morning following her exposure, to remain at home and keep quiet, that she disobeyed his instructions and continued to teach school without interruption from December 6th until December 23d, when the miscarriage occurred. But the evidence also shows without contradiction that the fetus when delivered was dead and in a state of decomposition, indicating that this condition had been produced by the injuries received in falling into the cattle guard. And so no amount of care on the part of appellee after she received the injury would have prevented the miscarriage, or have restored to life the unborn child. Therefore the failure of appellee to observe the directions of her physician did not bring about or contribute to the miscarriage. It would have happened whatever she did. There was no evidence to support the instruction offered upon this point, and so it was not error to refuse it, although in a proper state of case it would have been authorized. *C., N. O. & T. P. Ry. Co. v. Crabtree*, 100 S. W. 318, 30 Ky. Law Rep. 1000; *I. C. R. Co. v. Gheen*, 112 Ky. 695, 66 S. W. 639, 68 S. W. 1087, 23 Ky. Law Rep. 1952, 24 Ky. Law Rep. 68.

The law and the evidence justified the verdict, and the judgment thereon is affirmed.

COSSITT v. ST. LOUIS & S. RY. CO.

(Supreme Court of Missouri, Division No. 2, Nov. 23, 1909. Rehearing Denied Dec. 14, 1909.)

[123 S. W. Rep. 569.]

Carriers—Carriage of Passengers—Personal Injuries—Setting Down Passengers.*—It is the duty of a carrier of passengers to carry them safely to their destination, and put them off at safe places.

Carriers—Carriage of Passengers—Personal Injuries—Proximate Cause.—The act of a street car company in carrying a passenger by his station, and directing him to alight in a dark and strange place near a dangerous culvert crossing the right of way and under the belief that he was near the station platform, is the proximate cause of his subsequent falling into the culvert from the end of the platform over it, mistaken for the station platform, in his effort to reach his destination.

Carriers—Carriage of Passengers—Contributory Negligence.†—A street car passenger carried by his station and directed to alight in a dark, strange place has the right to assume that the place is safe, in the absence of directions how to reach his destination.

Damages—Pleading—Variance—Personal Injuries.—A petition, alleging that plaintiff's thigh bone was fractured, and that he was permanently injured and sustained other injuries, and that by reason thereof he was compelled to lie on his back for 13 weeks, is a sufficient basis for proof as to the bruising and stiffening of his knee, in the absence of an affidavit required by Rev. St. 1899, § 655 (Ann. St. 1906, p. 671), to show that defendant was misled.

Trial—Instructions—Requests.—A request for an instruction already given is properly refused.

Carriers—Carriage of Passengers—Contributory Negligence.—A street car passenger discharged into a dark, strange place between stations, who is ignorant of the fact that he has been carried by his station, must use ordinary care for his safety in proceeding to his destination; but he is not required to walk on the right of way to the next station.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

*See foot-note of *Sligo v. Philadelphia Rapid Transit Co.* (Pa.), 33 R. R. R. 710, 56 Am. & Eng. R. Cas., N. S., 710; foot-note of *Ward v. Chicago City Ry. Co.* (Ill.), 32 R. R. R. 597, 55 Am. & Eng. R. Cas., N. S., 597.

†See fifth foot-note of *Dieckmann v. Chicago, etc., Ry. Co.* (Iowa), 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346; second head-note of *Cincinnati Traction Co. v. Leach* (C. C. A.), 32 R. R. R. 193, 55 Am. & Eng. R. Cas., N. S., 193; third foot-note of *Rearden v. St. Louis, etc., Ry. Co.* (Mo.), 31 R. R. R. 429, 54 Am. & Eng. R. Cas., N. S., 429.

Cossitt v. St. Louis & S. Ry. Co

Action by John H. Cossitt against the St. Louis & Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action brought by the plaintiff for damages sustained by him in the city of St. Louis on the 18th day of September, 1903. In the petition it is alleged: That on the said 18th day of September, 1903, about 8 o'clock p. m., and after dark, at or near the corner of Vandeventer avenue and Morgan street, the plaintiff became a passenger on one of defendant's street cars for a trip westwardly, and paid his fare; that plaintiff was a stranger in said city, and soon after entering the car requested the defendant's conductor to stop the car for him to alight at a station on defendant's said railway known as "Clara station," which was a regular stopping place for passengers to alight. It is alleged: That it was the duty of the defendant's servant to carefully and safely carry the plaintiff to said Clara avenue station, and safely and without negligence land him and allow him to alight from said car at said station, and for that purpose to stop said car at and opposite a platform of said station; that when a car was stopped opposite said platform it was safe for passengers to get out of the same whether day or night; but that defendant's agents and servants negligently failed to stop said car at said Clara avenue station, but carried plaintiff 100 feet beyond the same; that plaintiff on said trip was seated in said car, and, believing he was near said station, arose and walked to the rear platform, and, after being there awhile, the conductor stopped said car and invited and directed plaintiff to alight at said point 100 feet west of said Clara avenue station on defendant's right of way; that plaintiff thereupon alighted after dark upon defendant's right of way where said car stopped as aforesaid, and did not know and could not see where he was, but supposed he was at a point near the said platform. And plaintiff states: That the place where he was invited, directed, and permitted to alight from said car was an unsuitable and dangerous place after dark to land a person alighting there by reason of the fact that a person so getting off of said car could not proceed southwardly to the public streets by reason of fences and sheds along defendant's right of way, and northwardly there was a steep descent of about 5 feet from said railway's embankment, and in a westwardly direction there was a dangerous ditch, sewer, or culvert crossing defendant's right of way about 50 feet distant; that defendant's agents on said occasion wantonly, and with gross negligence, gave him no warning that said culvert or ditch was near to the westward point where he alighted, and gave him no directions how to reach a place of safety, and with gross negligence failed to give him notice that he had passed Clara avenue station, or that he had not landed in close

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proximity to the same; that, after alighting, plaintiff looked back and could see no platform, there was no light at said Clara avenue station, and by the light of the rapidly receding car he caught a glimpse of a platform crossing defendant's tracks distant about 50 feet, which platform was similar in appearance to the platform crossing defendant's tracks at said Clara avenue station, and which said platform which he saw was over said sewer, ditch, or culvert and extended about six inches southwardly of the south rail of the southernmost track of the defendant's railway and there ended abruptly; that said platform or crossing over said ditch or culvert was the nearest platform to the place where plaintiff alighted, and, being apparently the Clara avenue station platform, and plaintiff, being unable by reason of the darkness to see his way, in attempting to continue his journey to a public highway on foot, walked on and along defendant's right of way to and upon said platform or crossing over said ditch, sewer, or culvert and southwardly upon the same towards Cabanne avenue, which he was seeking, and fell off of the end of the said platform down a distance of about 18 feet onto the ground and into said ditch, sewer, or culvert, and was greatly and permanently injured, sustaining a double fracture of the right thigh bone between the knee and hip; three of his front teeth were driven inwardly, his face and hands cut, and he sustained other cuts and wounds, and by reason of which he was obliged to lie constantly on his back for 13 weeks, and was confined in a hospital for more than 4 months; that plaintiff had alighted prior to said occasion two or three times at said Clara avenue station. There is a platform crossing said defendant's tracks similar in appearance to the platform from which plaintiff fell as aforesaid, but which leads to steps descending about five feet or more to a walk upon which passengers can safely reach Cabanne avenue, which plaintiff was seeking to reach on the occasion aforesaid, and plaintiff avers that in walking southwardly on said platform, when he was hurt, he followed the custom which he had theretofore pursued at the several times he had landed at the said station and had walked southwardly on the platform there on his way to Cabanne avenue. Plaintiff states that the defendant and its servants in charge of its said car were guilty of acts of gross and wanton negligence in carrying him past Clara avenue station as aforesaid, in stopping said car and inviting, requesting, directing, and permitting him to alight where he did as aforesaid; in not giving him notice that he had passed said station as aforesaid; in not giving him any notice which way to proceed to reach a place of safety; in not giving him any notice of the proximity of the said dangerous crossing over said culvert, ditch, or sewer; and in not giving him any notice of the danger of walking westwardly along its said tracks—which acts of negligence each and all directly con-

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tributed to plaintiff's injuries, and the defendant was further grossly negligent in not having a light burning at said Clara avenue station at the time plaintiff alighted as aforesaid, which said negligence also directly contributed to his injuries. The damages were laid at \$10,000 compensatory and \$5,000 punitive. The answer was a general denial, coupled with a plea of contributory negligence. The reply was a traverse of the new matter in the answer.

The evidence tended to show that on the 18th day of September, 1903, about 8 o'clock at night, the defendant received the plaintiff as a passenger on one of its street railway cars in the city of St. Louis and undertook to transport him westwardly to one of its stations located on Clara avenue. The plaintiff was carried about 100 feet beyond his destination, to wit, Clara avenue, and alighted from the car about 50 feet from a platform or culvert similar to the one at Clara avenue. Plaintiff testified that when he got on the car he told the conductor that he wanted to get off at Clara avenue. On three occasions before this plaintiff had gone out on one of defendant's cars and had gotten off at Clara avenue. There is a station at this place. On these occasions plaintiff got off on this platform. At these times he described his conduct as follows: "I got off the car at the Clara avenue station at the north side, crossed the tracks over the board walk, went down the steps and along the sidewalk to Cabanne avenue, and then to Mr. Jarvis' house, about one-half block distant." On this occasion, a short time after plaintiff had taken his seat in the car, the conductor came around and collected his fare, and he requested to be put off at Clara avenue, and the conductor said, "All right." Prior to this occasion, the plaintiff had never been west of Clara avenue station. When plaintiff thought they were nearing Clara avenue, he got up and went back to the back platform where the conductor was. After standing there a while, the conductor turned around and said, "You wanted Clara avenue?" and plaintiff said, "Yes," and then the conductor stopped the car, and plaintiff got off. He looked to see if he could see the station; but it was dark, and there was no light. It was then about 8:30—between 8 and 8:30—in September. He testified that as the car was going by he saw by the lights therein some planks which he thought was a crossing of the railroad track, and he walked down to these planks, and started towards Cabanne avenue. He walked across on these boards or planks and fell over the edge into a sewer or ditch. Cabanne avenue runs parallel with defendant's railroad track at this point and is about a half block south. The sewer or ditch into which plaintiff fell was from 15 to 18 feet deep, and the fall broke his right thigh, knocked in some of his teeth, cut his lip, and bruised his hand, and from these injuries he was compelled to remain in the hospital for 23 weeks. There were

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also injuries to his knee. There was no light at the Clara avenue station that night. The defendant offered evidence tending to show that on the night of the injury the plaintiff stated to two different persons that he knew he was being carried past Clara avenue station, and when he got off the conductor told him to go back; but the plaintiff in rebuttal contradicted the evidence of Dr. Ambrose as to his alleged statements to him.

T. M. Pierce, Robert Moloney and Boyle & Priest, for appellant.

Willi Brown, for respondent.

Fox, J.. (after stating the facts as above). 1. On two grounds, the defendant insists the plaintiff did not make a case entitling him to recover: First, because the testimony did not establish any proximate connection between the fact that the plaintiff was negligently carried past his destination and his subsequent falling into the ditch, under a mistaken idea of his surroundings; and, second, because plaintiff's contributory negligence, in failing to look about him after he alighted from the car, ought to debar his recovery. These propositions will be considered in their order. Was the conduct of the conductor in failing to stop the car at Clara avenue station, as he had been requested by plaintiff and had agreed to do, and in stopping the car, in the nighttime, and at least practically directing him to get off in close proximity to the culvert into which he fell while endeavoring to find his way to Cabanne avenue, the proximate cause of plaintiff's injuries? We think it was, on principle and according to the great weight of authority in this and other states. It is elemental that it is the duty of a carrier of passengers to safely carry them to their places of destination and put them off at safe places. *McGee v. Railway*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *Griffith v. Railway*, 98 Mo., loc. Cit. 174, 11 S. W. 559. By their verdict the jury found that, when the plaintiff began his journey on this car that night, he requested to conductor to put him off at Clara avenue, and the evidence all concurs in establishing that the night was dark, and there was no light in the Clara avenue station when the car reached that point, and the conductor did not stop the car at that station, but carried plaintiff about 100 feet beyond or west of the station when he said to plaintiff, "You wanted Clara Avenue?" and plaintiff said, "Yes." Thereupon the car was stopped, and plaintiff alighted. It is too plain for discussion that this was an invitation and direction by the conductor to plaintiff to alight at this point and was tantamount to an assertion that this was Clara avenue, and plaintiff was justified in acting upon that statement. In *Winkler v. Railroad*, 21 Mo. App., loc. cit. 106, it was said: "If a passenger, instead of being discharged at the place called for in the contract of carriage, is discharged in the nighttime at another place, so that in getting to his place

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of destination it becomes necessary to walk along a path containing a dangerous obstruction, it is not too much to say that the danger of being injured by such obstruction is a danger which the carrier ought to foresee, and that it is not an unnatural, improbable, or remote consequence of the act of discharging the passenger in such a place."

Counsel for defendant says it is a very reasonable requirement to say that a carrier should anticipate, when it puts a passenger off in the darkness and knows that he must walk back over the right of way, that he may fall into certain pitfalls or stumble into concealed dangers, but asks how it can be said that a carrier will suppose that a passenger will mistake a culvert perfectly safe to pass over, for a platform, and walk off of it? The obvious answer to this contention is that, by its neglect of the plain and simple duty of stopping the car at Clara avenue station and putting plaintiff off, it had caused him to alight in the dark in close proximity to the dangerous culvert and under the belief that he was near to the Clara avenue platform, and, by its wrongful act having placed plaintiff in this dangerous place, it cannot escape from the consequences of its neglect because plaintiff in good faith and in the dark mistook the planks on the culvert for the Clara avenue station platform and in his effort to reach Cabanne avenue fell into the culvert. Certainly it is in no position to complain, as it does, that he did not walk along its tracks directly back to the said station, when there is positive evidence that there was no light at the said station, and the conductor gave him no directions to reach the station, nor any warning of his dangerous surroundings. This court, in *McGhee v. Railway*, 92 Mo., loc. cit. 219, 4 S. W. 741 (1 Am. St. Rep. 706), adopts with approval the language of Breach on Contributory Negligence, p. 71, § 23, as follows: "When defendant by his own negligent or wrongful acts or omissions throws plaintiff off his guard, or when the plaintiff acts in a given instance upon a reasonable supposition of safety induced by the defendant when there is, in reality, danger to which plaintiff is exposing himself in a way and to an extent which but for the defendant's inducement, might be imputed to the plaintiff as negligence, sufficient to prevent a recovery, such conduct on the part of the plaintiff, so induced, will not constitute contributory negligence in law," etc. Granting that plaintiff was confused, having just alighted from a brilliantly lighted electric car, into a dark and strange place, surely it was not his fault that, relying upon the implied assurance that he was at Clara avenue station, and discerning what appeared to him, in the passing light, to be the station platform, he wended his way in that direction. Nor is the defendant absolved from its negligent act in carrying plaintiff beyond his destination and putting him off in the dark by the mere fact that he was not hurt in alighting, or did not immediately fall into a

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culvert or ditch. The rule is by no means so restricted. As was said in *Atkinson v. Railway Co.*, 90 Mo. App., loc. cit. 497: "Had the physical condition of the locality where he alighted been unsafe and dangerous by reason of ditches, embankments, bridges, cattle guards, or like things, and the plaintiff has been injured by reason thereof in making his way to the station, the defendant would have been liable under the authorities, for the law presumes that the defendant's agents are familiar with the immediate physical surroundings of its tracks. The injury would have been within the reasonable expectation of the wrongful act of putting him off of the train at an unsafe place." *Rigby v. Hewett*, 5 Excheq. 243; *Rearden v. Railway*, 215 Mo. 105, 114 S. W. 961.

2. The second point has even less merit. The defendant was distinctly notified that plaintiff desired to get off at Clara avenue station when the conductor received his fare, and, when plaintiff thought he was nearing that station, he went out on the rear platform. There was no light at the station, and he did not see it. He had never been west of that station on this line, and consequently was necessarily unacquainted with the surroundings. The conductor by inquiring if he wanted to get off at Clara avenue, and receiving an affirmative reply, and then stopping the car, plainly intended to direct the plaintiff to alight where he did, and plaintiff, in the absence of any and all directions how to reach the passway to Cabanne avenue or to get to the station, whether to go back or forward, had a right to think he was in a safe place, and there is nothing in the evidence which would have justified the circuit court in instructing the jury that plaintiff was guilty of such contributory negligence as would bar his recovery. Whether or not he did exercise ordinary care in attempting to extricate himself from his position was fairly submitted to the jury, and they have found for him on that issue.

3. Error is predicated on the admission of evidence on the part of the plaintiff to the effect that one of his knees had been injured by the fall and had become stiff. The contention is that the petition was not specific enough to justify this testimony. The allegation as to the injuries was as follows: "Plaintiff fell off of the end of said platform down a distance of about 18 feet to the ground and into said ditch, sewer, or culvert, and was greatly and permanently injured, sustaining a double fracture of the right thigh bone between the knee and hip, three of his front teeth were driven inwardly, his face and hands cut, and he sustained other cuts and wounds, and by reason of said injuries he was obliged to lie constantly on his back in bed for more than 13 weeks continuously and was confined to a hospital for more than four months." Among other witnesses, Dr. Warren B. Outten testified on behalf of plaintiff. He was and is a surgeon of great experience. He took charge of plaintiff at the Baptist

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Hospital the night he was hurt. He found upon examination that plaintiff was suffering from a fracture of the thigh and a contused and lacerated wound on the right side of the knee. After detailing the character of splint used for the purpose of extension to prevent any shortening of the leg and the length of time plaintiff was kept in the hospital, some 20 weeks, he stated they put the limb in plaster of paris, and that he had examined the plaintiff the Sunday before the trial, and found the bones had knitted and that the result was perfect. There was no shortening of the limb, but there was an ankylosed knee. In regard to this, he explained: "Very frequently, after treating any fracture of the thigh, and the part is kept under imposed rest, say 10 or 12 weeks, the knee becomes stiffened in consequence of the disposition of fibrinous matter. Owing to the stiffening, why the consequence is he can bend it only to a certain extent; and it is this treatment of imposed rest, along with that, that there might have been some contusion of the joint at the time of the injury, which, of course, we did not determine the exact amount because there was no necessity for doing that." "There was left a deposit there, and this produced a thickening of the cartilages and a stiffening of the knee." After Dr. Outten had given this evidence, the record shows that Mr. Brown, attorney for the plaintiff, remarked: "It is understood that Mr. Chandler is objecting to everything about the knee. The Court: Yes, sir. Mr. Chandler: We do object to all the evidence with regard to the knee, and it is understood that our objection applies to all that is gone in. The Court: Yes, sir; and it is overruled." To which ruling counsel for defendant duly excepted.

It will be observed that there was no ground whatever stated for the objection at the time. If this were all, this point could be readily disposed of; but it appears that, when the plaintiff himself was on the stand, his counsel inquired if there was any other injury, and he answered, "I bruised my knee." Whereupon counsel for the defendant moved to strike out the statement of the injury to his knee on the ground that the petition made no claim for damages for such injury, which motion the court overruled and counsel excepted. By section 655, Rev. St. 1899 (Ann. St. 1906, p. 671), it is provided: "No variance between the allegation in the pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; when it shall be alleged that a party has been so misled, that fact should be proven to the satisfaction of the court by affidavit showing in what respect he has been misled and thereupon the court may order the pleading to be amended upon such terms as shall be just." In *Fisher Co. v. Realty Co.*, 159 Mo. 567, 62 S. W. 444, it is said: "That a party cannot declare upon one cause of action and recover upon another is axiomatic in our law;

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but it is also equally well settled in our state that timely and appropriate objection must be made to the introduction of the evidence offered on the distinct ground of a variance between the allegata and probata, and that the objecting party must proceed in the manner provided by section 2096, Rev. St. 1889; otherwise his objection will not be considered. *Briggs v. Munchon*, 56 Mo. 467; *Ely v. Porter*, 58 Mo. 158." "And the affidavit setting forth in what respect a party has been misled is the sole test of the materiality of a discrepancy between the allegata and probata. *Turner v. Railroad*, 51 Mo. 501; *Meyer v. Chambers*, 68 Mo. 626; *Olmstead v. Smith*, 87 Mo. 602. If a party fails to avail himself of section 2096, *supra*, in the trial court, it is too late to complain in the appellate court"—citing cases.

The defendant in this case pursued no such course; but, independently of this statutory provision for saving the point as to a variance, we think that the allegations of the petition were broad enough to cover the proof as to the stiff knee. Dr. Outten's testimony shows that that was the result of a fracture of the thigh bone and was a natural result. In *Brown v. Railway Co.*, 99 Mo. 317-319, 12 S. W. 655, Judge Black, speaking for this court, pointed out that general damages are such as a law implies or presumes to have occurred from the wrong complained of, and they need not be pleaded. In such cases the wrong itself fixes the right of action, special damages are such as really take place, and are not implied by law. They are either super-added to general damages arising from an act injurious in itself, or are such as arise from an act not actionable in itself, but injurious only in its consequences. Special damages must be stated in the petition with a reasonable degree of particularity, and it must appear that the damage is the natural, through not necessary, consequence of the wrong. Dr. Outten's testimony shows that the stiffening of this knee was a natural and very frequent consequence of a fracture of a thigh bone, and we think that the allegation of the fracture of the thigh bone with the other allegation plaintiff was greatly and permanently injured and sustained other cuts and wounds, and by reason of said injuries was compelled to lie constantly on his back for more than 13 weeks continuously, furnish a sufficient basis for this proof, in the absence of the affidavit which the law requires on the part of the defendant to show that it had been misled to its damage by reason of not specifying particularly the stiff knee.

4. Complaint is made that the court refused the following instruction asked by the defendant: "The court instructs the jury that, if they believe from the evidence in this case that plaintiff knew he had been carried past Clara avenue at the time he alighted from the car in question, then it was his duty to walk back to Clara avenue, and the jury will find for the defendant." The court had already submitted to the jury in its first instruction

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the question as to plaintiff's knowledge, at the time he alighted from the car, that he had been carried past Clara avenue station, and there was no error in refusing this instruction. The court also refused another instruction requested by the defendant, as follows: "The jury are instructed that if plaintiff might have safely passed over defendant's tracks from the point where he alighted to Goodfellow avenue, or might have returned in safety to so-called Clara avenue, but, instead thereof, negligently elected to take his chances in the darkness, and was hurt in consequence, he cannot recover in this action." There was no testimony in the case that defendant's tracks were safe for a stranger to walk on in the nighttime. This instruction assumes the law to be that it was the duty of the plaintiff, let off as he was, in the dark between stations, to walk along the defendant's right of way to the next station. It is absolutely certain that the plaintiff had never been past the Clara avenue station and knew nothing about whether the track was safe or not in that direction, and, having just left an electric-lighted car and stepped out in the darkness, his vision would naturally not be very good, and there was no light burning at Clara avenue station to guide him in the darkness in that direction. We think there was no error whatever in refusing this instruction, as the court in its first instruction properly laid down plaintiff's obligation in the premises when it told the jury that if they believed from the evidence that plaintiff, in ignorance of the fact that he had been carried beyond Clara avenue station, upon the said car being stopped alighted from the same, and in the exercise of ordinary care for his own safety proceeded to go to his own destination, and in so doing fell from the platform over defendant's tracks, which was near the place where plaintiff alighted, and into a ditch or sewer on defendant's right of way, and was thereby injured, then they would find for the plaintiff.

The case seems to have been carefully and well tried, and there is no question whatever but that the plaintiff suffered a very painful and serious injury, and there is no suggestion that the damages awarded him are excessive.

Judgment is affirmed. All concur.

CENTRAL OF GEORGIA RY. CO. *v.* CARLETON.

(Supreme Court of Alabama, Nov. 19, 1909.)

[51 So. Rep. 27.]

Carriers—Action—Injury to Passengers—Complaint—Sufficiency.

A complaint in an action against a carrier, which alleges that decedent was a passenger, that the conductor, while acting within the scope of his authority, ordered decedent to leave a coach and go into another while the train was in motion, that decedent, while attempting to comply with the order, was thrown from the train and killed, and that his death was proximately caused by the negligence of the carrier's servant, states a cause of action in tort, and is sufficient.

Carriers—Injury to Passengers—Complaint—Sufficiency.—A complaint in an action against a carrier, which alleges that decedent was a passenger, and that his death was proximately caused by the negligence of the trainmen in and about the carriage of decedent as a passenger, or which alleges wanton, willful, and intentional misconduct of the trainmen, states a cause of action as against a demurrer.

Appeal and Error—Judgment Entry—Conclusiveness.—A statement in the judgment entry that a demurrer was filed to a plea in so far as it applied to certain counts of the complaint, and was sustained, indicates that a plea was filed in that language, and, on the demurrer not being set out, the judgment must be deemed correct on appeal.

Carriers—Passengers—Liability.—A conductor is not justified in ordering or compelling a white passenger in the negro coach to go into another coach while the train is running at a dangerous rate of speed.

Carriers—Passengers—Injuries—Liability.*—The fact that a passenger has by intoxication voluntarily deprived himself of the ability to exercise ordinary care does not furnish any excuse for the conductor to force him from a place of safety in the train to one where it will require extraordinary care to avoid injury, and when the intoxication is apparent to the conductor it calls for extra precaution on his part.

Evidence—Evidence at Former Trial.—To permit a witness to testify as to what a witness swore to on a former trial, it is necessary only that the witness can state the substance of the former testimony, and he need not state the exact words; but a witness who shows

*For the authorities in this series on the subject of the duties of the carrier with respect to passengers or prospective passengers in a state of intoxication, see first foot-note of *Louisville & E. R. Co. v. McNalley* (Ky.), 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642; *Stringfield v. Louisville Ry. Co.* (Ky.), 29 R. R. R. 648, 52 Am. & Eng. R. Cas., N. S., 648; *Chesapeake & O. Ry. Co. v. Crank* (Ky.), 29 R. R. R. 657, 52 Am. & Eng. R. Cas., N. S., 657; last head-note of *Mobile, etc., R. Co. v. Jackson* (Miss.), 30 R. R. R. 120, 53 Am. & Eng. R. Cas., N. S., 120.

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that he does not remember even the substance of parts of the testimony is incompetent.

Evidence—Evidence at Former Trial.—A bill of exceptions is inadmissible to prove the testimony of a witness on a former trial.

Carriers—Passengers—Contributory Negligence.—Where a passenger is directed by an agent of the carrier, acting in the line of his duty, to pass from one car to another while the train is in motion, and the danger in doing so is not obvious, he is not negligent in attempting to obey, and where injury results the carrier is liable.

Appeal from Circuit Court, Tallapoosa County; B. M. Miller, Judge.

Action by H. M. Carleton, as administrator of Joseph Umphrell, against the Central of Georgia Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The complaint is in the following language:

Count 11: "Plaintiff claims of the defendant \$1,999 damages, for this: That on the 4th day of November, 1909, defendant, a corporation, was engaged in operating a railroad through the counties of Lee, Chambers, and Tallapoosa, and others, in the state of Alabama, and was operating a train of cars propelled by steam for the transportation and carrying of passengers upon and along the track in said counties; that Joseph Umphrell, plaintiff's intestate, was a passenger on said train, and it was the duty of defendant to operate said train of cars in a manner that would be safe for the passengers thereon, and to furnish safe transportation for plaintiff's intestate, and to carry him safely to his destination; that, while plaintiff's intestate was a passenger on said train as above alleged, defendant, by and through its agents, servants, or other employees, ran and operated said train at a dangerous and reckless rate of speed, and while it was being so operated at such dangerous and reckless rate of speed the conductor on said train, or the person who was acting as conductor on said car in which plaintiff's intestate was, whose name is unknown to plaintiff, but who was a servant or employee of defendant, while acting within the scope of his authority as such conductor or assistant conductor, ordered and compelled plaintiff's intestate to leave said car, and go outside of the same, and in attempting to leave said car, and to go therefrom to another part of said train, as he was ordered and compelled to do by defendant's said agent, servant, or employee, said conductor or assistant conductor of said train, plaintiff's intestate was thrown from said train and killed; and plaintiff avers that the death of said Joseph Umphrell was proximately caused by the negligence of defendant's servant, agent, or employee in and about the carriage of plaintiff's intestate as a pas-

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senger of the defendant, and in compelling plaintiff's intestate to leave said car."

Count 14: "Plaintiff further claims of the defendant, a body corporate doing business as a common carrier in Chambers and Tallapoosa county, Alabama, \$1,999, for this: That on, to wit, November 4, 1905, Joseph Umphrell, plaintiff's intestate, while a passenger on defendant's railroad, was killed; and plaintiff avers the death of said Joseph Umphrell to have been caused by the acts or negligence of the defendant's servants, agents, or employees in and about the carriage of plaintiff's intestate as a passenger of the defendant."

Count 15 alleges that plaintiff's intestate, while a passenger on the train upon defendant's railway, was killed; and plaintiff avers the death of said Umphrell to have been caused by the acts or negligence of the conductor or assistant conductor of said train, the servants, agents, or employees of defendant in and about the carriage of plaintiff's intestate as a passenger.

Count 16: Same as 15, except that it is alleged that plaintiff was a passenger between Waverly and Dadeville, Ala.

Count 17: Same as 14, except that it counted upon wanton, willful, or intentional misconduct in and about the carriage.

Demurrers were interposed to the complaint as follows: Because it fails to show by what authority or right Bryan was acting as conductor or assistant conductor of said train. Because it fails to show with sufficient certainty that plaintiff's intestate was compelled, or how he was compelled, to leave said car while the train was moving at a dangerous rate of speed. It shows that plaintiff's intestate was guilty of contributory negligence in attempting to pass from one car to another while the train was running at a dangerous rate of speed. Because it fails to state the facts showing that plaintiff was compelled, or how he was compelled. Because it assumes that plaintiff's intestate was compelled to do a dangerous and negligent act, because he was ordered to do so, when such is not the law. Because it fails to show with sufficient certainty where plaintiff's intestate was at the time he was ordered by the conductor to go to another part of the train. Because said complaint joins an action on contract and in tort. To the fourteenth count: Because it fails to show or aver who the servants, agents, or employees were who it alleges were guilty of negligence, or to show that they were actually within the scope of their authority as the servants, agents, or employees of defendant. To the fifteenth count: Because it fails to show or aver with sufficient certainty that the injury complained of was caused by any negligence on the part of the conductor or assistant conductor. Because it fails to show with sufficient certainty in what the acts complained of consisted. Because it fails to show or aver that the said conductor or assistant conductor was acting within the scope of his authority at the time

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of the alleged acts or negligence complained of. The same demurrers were interposed to the sixteenth and seventeenth counts.

Plea 9 is as follows: "That if plaintiff's intestate was ordered by the conductor or assistant conductor of said train to leave said car and go therefrom to another car, or to another part of said train, as is alleged in the complaint, that said conductor or assistant conductor was authorized and required by law to give such order, and assign plaintiff's intestate to another car, because said intestate was a white man, and at the time of said alleged order was in a car set apart for negroes or colored passengers, and was violating the provisions of the statute providing equal and separate accommodations for the white and negro races on railroad passenger trains; and defendant avers that plaintiff's intestate, by being in said negroes' car, caused or proximately contributed to the injuries complained of."

Plea 10: "That plaintiff's intestate by intoxication voluntarily incapacitated himself from ability to exercise ordinary care for his own protection, and by reason of said voluntary intoxication he caused or proximately contributed to the injury complained of."

The oral charge No. 1 is as follows: "That if the conductor or other employee orders a person off the train, or forces him off and onto the platform, and that platform was a dangerous place for him to be, and they force or order him out, and as a proximate consequence of his being ordered or forced out he fell from the train, then the defendant would be liable."

The following charges were refused to the defendant: (3) Affirmative charge as to the eleventh count. (4) Same as to first count. (5) Same as thirteenth count. (10) Affirmative charge as to the eighteenth count. (11) Same as to the nineteenth count.

George P. Harrison, for appellant.

James W. Strother, for appellee.

SIMPSON, J. This is an action by the appellee against the appellant for damages on account of the death of plaintiff's intestate while a passenger on the railway of defendant.

Count 11 is in tort, for the breach of duty in ordering and compelling plaintiff's intestate to go upon the platform, from which, as a proximate consequence, he fell. It is not subject to the causes of demurrer assigned. It shows the relation of passenger and carrier and that the injury resulted as the proximate consequence of negligence of the employee of defendant, in charge of the train. *B. R., L. & P. Co. v. Adams*, 146 Ala. 267, 40 South. 385, 119 Am. St. Rep. 27.

Counts 14, 15, 16, and 17, also, were sufficient, and the demurrer, to these counts were properly overruled. *Armstrong, Adm'r, v. Montgomery Street Railway*, 123 Ala. 233, 244, 26 South. 349; *B. R., L. & P. R. Co. v. Adams*, *supra*.

The appellant insists that the court sustained a demurrer to plea 2, when none had been interposed. The demurrer, as set

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out in the record, was not simply to the plea "in so far" as it applies to certain counts, but was to the entire plea; one of the grounds of demurrer being that it undertook to set up contributory negligence and was filed to each count of the complaint, when some of them charged willful, wanton, or intentional conduct. It is manifest that the only judgment which could be rendered on this demurrer would be either to sustain it or to overrule it. If sustained, the plea would be eliminated from the record, unless it was amended so as to omit the defective portion.

The judgment entry states first that the demurrer to said plea is sustained in so far as it applies to certain counts of the complaint, and this is followed by the further statement that, a demurrer being interposed to said plea, the same was sustained, which is the proper judgment. As the first statement in the judgment entry, that a demurrer was filed to the pleas, "in so far as they apply to" certain counts, and sustained, indicates that a plea was filed in that language, and the said demurrer not being set out, the judgment of the court must be held to be correct. If there was such a plea, the judgment is correct; if there was not, the judgment in that particular is harmless.

There was no error in sustaining the demurrer to the ninth plea. Said plea does not deny, or confess and avoid, the allegations of the complaint. It does not answer the allegations, contained in each count, which attempted to set out the facts showing that the plaintiff was not only ordered out of the car, but was "compelled" to go out on the platform, or was "driven out." Moreover, even though the plaintiff may have been in the negro coach, this would not necessarily justify the conductor in ordering or compelling him to go into another coach while the train was running at a dangerous rate of speed. *Carleton v. Central of Georgia Railway*, 46 South. 495.

There was no error in sustaining the demurrer to the tenth plea. In addition to the fact that said plea is to the "complaint as a whole, and to each count separately," the fact that a party had voluntarily incapacitated himself from ability to exercise ordinary care for his own protection, by intoxication, would not furnish any excuse for the officer in charge of the train to force him from a place where he was safe to one where it would require extraordinary care to avoid injury.

The quotation from *Wood on Railroads*, cited from *Fisher v. W. Va. & P. R.*, 39 W. Va. 380, 19 S. E. 583 (23 L. R. A. 758), to wit, that "one cannot voluntarily incapacitate himself from ability to exercise ordinary care for his own self-protection, and then set up such incapacity as an excuse for his failure to use care; and if the intoxication contributed to the injury as a proximate cause thereof, it is a complete bar to any action for damages sustained in consequence of it," is inapplicable. The plaintiff is not setting up his intoxication in this case; but, on the contrary, the defendant is setting it up as an excuse for its

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negligence, notwithstanding the plaintiff was in that condition. If the plaintiff was in that condition, and it was apparent to the conductor, it called for extra precaution on his part. *Johnson v. L. & N. R. R. Co.*, 104 Ala. 241, 16 South. 75, 53 Am. St. Rep. 39; *L. & N. R. R. Co. v. Johnson*, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372.

The court erred in refusing to exclude the testimony of J. H. Lynch as to what Will Shealy testified to on a former trial. While it is true that, in order to testify as to what a witness swore to on a former trial, it is necessary only that the witness can state the substance, and not the exact words that were spoken, yet it is necessary that he remember the substance of all of the testimony. The witness in this case showed, on cross-examination, that he did not remember even the substance of certain parts of the testimony. *Magee v. Doe ex dem.*, etc., 22 Ala. 700, 720; *Davis v. State*, 17 Ala. 354, 557; *Gildersleeve v. Caraway, Use, etc.*, 10 Ala. 260, 263, 44 Am. Dec. 485.

There was no error in refusing to admit the bill of exceptions on the former trial, to show what the evidence testified to. *Illinois Central R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521, 522.

There was no error in giving that part of the oral charge numbered 1. There is no proof that it was obviously dangerous to go on the platform, so as to charge the intestate with contributory negligence in obeying the order of the conductor. "If the passenger be directed by an agent of the company, acting in the line of his duty, to pass from one car to another while the train is in motion, and the danger in doing so is not obvious, he will not be negligent in attempting to obey the agent's direction, and if injury ensues the company will be liable." 3 *Hutchinson on Carriers* (3d Ed.) p. 1399, § 1192; *Id.* p. 1408, § 1197.

Charges 3, 4, and 5, requested by the defendant, should have been given, as counts 11, 12, and 13 charge that the train was being run at a dangerous and reckless rate of speed, and there is no evidence tending to show such speed. *K. C., M. & B. R. R. Co. v. Burton*, 97 Ala. 240, 259, 12 South. 88.

Charges 10 and 11, requested by the defendant, were properly refused, as counts 18 and 19 charged only that the train was running at a high rate of speed, and there was evidence tending to show that. It was for the jury to determine whether the act of the conductor was willful or wanton.

There was no error in the refusal to give charges 7, 8, 9, and 11, requested by the defendant, being the general affirmative charge as to counts 15, 16, 17, and 19. Neither of these counts charges that the damnifying act was that of the defendant itself.

The judgment of the court is reversed, and the cause remanded.

Reversed and remanded.

DOWDELL, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

TUCKER *v.* VICKSBURG, S. & P. RY. CO.

(Supreme Court of Louisiana, Feb. 14, 1910. On Application for Rehearing, March 14, 1910.)

[51 So. Rep. 689.]

Nuisance—Abatement—Evidence.*—This is an action by plaintiff to obtain an injunction to abate a nuisance of smoke, noise, and vibration caused by the operation of a roundhouse by the defendants near the property of plaintiffs. While the noises complained of are annoying, and should be lessened as much as possible, still they do not appear to affect the rights of the plaintiff to such an extent as to cause the removal of the works of the defendant.

Nuisance—Abatement—Evidence.—The evidence does not show the vibration to be of such a character as to interfere with a substantial right of the plaintiffs so as to order the removal of the works of the defendant.

Nuisance—Abatement—Smoke.—While railroads as quasi public corporations enjoy certain privileges in reference to the emission of smoke from their property, still they should use every means at their command to lessen the amount of annoying smoke. While the neighbors of such a corporation cannot expect too much, still the railroad will be ordered to use approved methods to minimize any annoyance from its operation.

Nuisance—Abatement—Noises.—The testimony regarding the whistling noise is not such as to make up a case requiring the interference of the court.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by J. M. Tucker against the Vicksburg, Shreveport & Pacific Railway Company. Judgment for defendant, and plaintiff and interveners appeal. Reversed in part.

E. W. Sutherlin and *T. C. Barrett*, for appellants.

Wise, Randolph & Rendall, for appellee.

Statement of the Case.

BREAUX, C. J. This was a suit for the removal of a nuisance committed, it is charged, by the defendant company.

The roundhouse, and turntables and side tracks, spur tracks

*For the authorities in this series on the subject of railroads and things pertaining to railroads as nuisances, see last foot-note of *Twenty-Second Corp. of Church, etc. v. Oregon Short Line R. Co.* (Utah), 33 R. R. R. 384, 56 Am. & Eng. R. Cas., N. S., 384; foot-note of *Galveston, etc., Ry. Co. v. Groff* (Tex.), 33 R. R. R. 317, 56 Am. & Eng. R. Cas., N. S., 317; foot-note of *Chesapeake & O. Ry. Co. v. Greaver* (Va.), 33 R. R. R. 418, 56 Am. & Eng. R. Cas., N. S., 418.

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and switch tracks, against which the complaint is leveled, are situated at corner of Cotton street between Marshall and McNeil streets in Shreveport.

Plaintiff asks for a judgment for the removal of the works, coupled with an injunction restraining defendant from using the roundhouse and other houses, tracks, and other appurtenances.

Plaintiff and a Mr. Jordon and the interveners are the joint owners of valuable dwelling houses at or near the corner of Marshall and Cotton streets, fronting on the former street and on the latter. Plaintiff and his family occupy one of the houses fronting on Cotton street.

Other houses above mentioned are occupied by interveners or leased to tenants for residence and boarding houses.

Plaintiff sets out that, in operating the cars and the engines in and about the roundhouse, the soot, cinders, coal, and dust are unendurable; that the steam and smoke and soot roll into and around his dwelling house; they soil and strain his furniture; that the air is poisoned by the gases; and that odors and vapors from these works at this place are impure and detrimental to health.

Plaintiff, in addition, complains of the noises: Halloaing of the workmen, who work late at night and early in the morning. The screeching, rumbling, and bumping of the turntable add to the discomfort.

Plaintiff's suit creates the impression that plaintiff suffers all the ills which can be inflicted by an operating railroad near one's residence.

Plaintiff is not alone in his complaints. Four interveners, residents and property holders of Shreveport, joined him by intervening in the suit.

Defendants, on the other hand, it appears, under their charter powers, bought the roundhouse, turntables, and tracks, as well as the lot on which they are situated, long anterior to plaintiff's ownership of the lots and dwelling houses above mentioned. At the time that the improvements were made, there were few buildings near the roundhouse. It was nearly a vacant space.

Plaintiff and others, who have joined him in this suit owing to the increase in the population of the city and the activity of its people and the improvement in values of property, found it to their interest to buy property and construct buildings thereon in the vicinity.

The defendant, in making out its defense, shows that it meets with difficulty in finding a suitable place elsewhere within the limits of the city or territory adjacent on which to erect its works. Its contention is that the noises, and smoke, cinders, and other unpleasant annoyances are inevitable.

Defendant urges that it is a quasi public corporation and has the legal right under its charter to build and operate its road and appurtenances, roundhouse, and turntable.

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These, in the main, are the defenses upon which defendant relies to defeat plaintiff's demand.

The case was tried before the court without a jury. The district court wrote a lengthy and well-considered opinion, rejected plaintiff's and interveners' demand, and dismissed their suits.

Statement of Facts.

Some time before suit was filed, the alleged nuisance was brought to the attention of the council.

That body, while recognizing a report of one of its committees regarding this alleged nuisance, to the extent of ordering it filed and approving it, took no further steps toward adopting a resolution for suppressing the asserted nuisance and toward giving effect to the representations of the committee.

On the trial of this case, a number of witnesses were heard. The preponderance of the testimony is with plaintiffs in regard to steam, smoke, and noise, and other alleged annoyances.

We deem it sufficient to state that beyond question the facts prove that plaintiffs are at times made quite uncomfortable by the causes sworn to by the witnesses for plaintiff. It is evident that the immediate vicinity of a railroad is not a pleasant place in which to dwell.

The conclusion arrived at relieves us from the necessity of particularizing all the incidents detailed by witnesses, further than to state that plaintiff as a witness, in a spirit of fairness, we will state, limits the annoyance to the smoke and the noise, and his testimony creates the impression that if these were suppressed he would be willing to suffer some, at least, of the other annoyances of which he complains.

The following are others of the facts considered in discussing the issues:

On the property adjacent to the roundhouse, the buildings were of little value for considerable distance before plaintiff and interveners built houses on it, at dates recent as compared to the date the defendant or its predecessor had the roundhouse built.

The number of cars has greatly increased and the business quadrupled of late years.

The houses of plaintiff and interveners are at about 150 feet from the roundhouse and appurtenances.

The noises consist, among others, of a piercing whistle for probably half an hour, which is trying to the nerves of a nervous person.

The witness who described circumstantially this piercing whistle did not at first know its cause, but he added, it was in not having enough pressure of steam to close the valve.

The testimony shows that there is at times a drumming noise.

The local superintendent of the defendant company was ap-

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pealed to several times by property owners to put an end to the asserted nuisance.

His answer was that the complaint would receive proper attention. He stated, also, that the defendant bought other property upon which to erect improvements, and as a result these improvements would afford some relief.

Engineers and other employees of the defendant testified in regard to the noise and smoke, and said it was the unavoidable noise of running a railroad train or engine. They testified particularly about the whistling noise before mentioned.

It is in place to state that the original road was constructed under Act 228 of 1853.

The defendant, in opposition to the charges of nuisance brought by plaintiff, invokes the fact that it occupies this property in accordance with law, that it is engaged in the legitimate business of operating a railroad, and that without noises, vibrations, and smoke a railroad cannot be operated.

Discussion and Judgment.

There are unquestionably noises, coming from defendants' roundhouse, that are exceedingly annoying at times.

We, none the less, have arrived at the conclusion that plaintiff is not entitled to relief in so far as relates to these noises. We have before noted one of the sounds comes from the engine and boiler. It seems that at a certain point, while steam is generated, this escaping steam will make a subdued noise, which will continue until the pressure of the steam against the valve closes the valve and closes the steam's escape, and thereby the noise is stopped.

The sound emitted, the witnesses state, is a hissing subdued sound, exceedingly trying to a person of a nervous temperament.

The witnesses of the plaintiff did not know the cause of the sound and suggested no relief.

The defendants explained the cause of this hissing noise, and said that it is unavoidable; that it is less than similar noises emitted from the engines and boilers of other railroads.

The subject of noises has heretofore received our attention. State ex rel. Denis v. Judge, 105 La. 731, 30 South. 101.

Although the cause of the noise in the cited case *supra* was different from those complained of in the present case, it was the story of disagreeable and annoying noise.

We could not grant relief in the cited case for reasons stated in the opinion; but we added that noises from bells or other sources should be reduced to a minimum, if possible, as they disturb needed rest and quiet. It was not shown (and the same is true in this case) that the noise caused damage of any kind. Although part of it should perhaps have been suppressed, under the facts and circumstances, the consummation devoutly to be wished was not exacted.

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In another case (*Froelicher v. Iron Works [Algiers]* 111 La. 705, 35 South. 221, 64 L. R. A. 228), the questions of noises and smoke were carefully considered, and the defendant was condemned to pay an amount.

In this case, it was proven beyond all question that the noise was loud and long. It caused illness in plaintiff's family; not only the noise was offensive, but the vibrations caused the walls of his dwelling house to fall, and they drove plaintiff from his home.

As relates to the noises, this case is not as strong and convincing for plaintiffs as the last-cited case. We have not found in the pending case that the noises are tortious, unreasonable, and unwarranted, although, doubtless, the inconveniences and annoyances and discomfort should be lessened as much as possible.

The noises, as developed by the testimony, do not appear to affect the rights of the plaintiffs to such a degree as to require the removal of all of defendant's works.

We take up for a minute the question of vibration, another of plaintiffs' causes of complaints.

As with the noises, the weight of the testimony does not show that plaintiffs' legitimate rights have been interfered with by them to an extent that renders removal of the works of defendant necessary. The property has not been in the least damaged. At times, we take it, slight vibration is felt. This, under the circumstances, cannot be helped. Vibration is very common. It is often felt without causing the least uneasiness. It is at times pleasant—the vibrations of musical instruments, of a bell, of vocal cords, of molecules of the earth, of houses, and so on.

These do not of themselves give rise to damages; interference with a substantial right must be shown in addition to the vibration.

This brings us to the smoke and cinders from the roundhouse and engines.

This gives rise to a serious question; it is not all smoke—not a mere theory of plaintiff.

There is smoke from the engines, at work in hauling the trains or in switches, that cannot be suppressed. No demand is directed against the running engines on the road.

Plaintiffs assail defendants' right to operate the roundhouse, the turntable, and the appurtenant tracks and switches.

Having considered the respective rights of parties, we decline making the whole of the injunction perpetual. We are of opinion, however, that plaintiffs are entitled to some relief from the smoke emitted by the engines and boilers in the roundhouse and when going to or from the roundhouse.

The smoke escapes from the sides of the roundhouse between

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the upright boards of its surrounding walls. These openings between the boards should be closed. Flues and tunnels for the smoke to escape can be made. If that does not suffice, the walls of the buildings may be raised higher. As to the engines and boilers (we refer to those taken to and from the roundhouse and to the engines placed on the side tracks near the roundhouse to fire them or to cool them off), wooden or other walls will have to be constructed to a sufficient height to direct it upward and keep it from the direction of the houses in question.

Science is credited with having discovered a smoke consumer or fumarole. For all we know, it may not be possible to use one of these inventions. This is mentioned in the discussion in passing.

We do know that in one of the cities of this state there is among her public ordinances one which is directed toward preventing factories and railroads from smoking out those who live in the immediate vicinity. This ordinance provides that a wall shall be built 20 feet higher than the houses immediately around.

We have not overlooked the decisions, cited by learned counsel for defendant, holding that railroad companies in the nature of their industry have special privilege to make noises and raise smoke; that they are necessary incidents to the service. We do not hold contrary to that view. At the same time, we are of opinion that if a roundhouse and appurtenances emit too much smoke, and it can be checked, it should be checked, and some relief given to the suffering people who reside near. When it appears that a railroad company can provide against a nuisance, it should make the necessary improvement.

If only a little smoke escapes from the roundhouse and engines, there is no necessity of removing them. If volumes of smoke are emitted, as testified to by plaintiffs' witnesses, they will be abated by our decree, practically sufficient to afford relief.

The principle of the common and of the civil law, as well as the rules of morality, teaches that one should not use his own to the detriment of his neighbor. Neither must the neighbor exact too much. There should if possible, be a medium. This it has been the purpose to find between these contending parties, one seeking to get rid of every vestige of annoyance, and the other to hold to ground it has owned since many years.

There must be some observance of the rule suggested by the words "to give and take."

The former should remember that they must put up with some annoyance; that a railroad company, even as relates to its roundhouse, turntables, and the like, is entitled to some right of immunity. Elliott on R. R., p. 811, § 1056.

While the defendant should bear in mind that grants of privileges confer no right to use in disregard of private rights; that

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in a populous part of a city greater precaution must be taken to avoid inflicting annoyances, discomfort, and distress than in the open country.

Only a few words before reaching the end:

This subject of nuisance, growing out of smoke and noises of transporting companies, gives rise to concern and causes thought. It is not in a satisfactory condition. The decisions throughout the country are not in accord by any means.

In some parts of Europe, it is in great part left to municipal regulation, under ordinance applying generally to the municipality.

In others, it is left to the common law and to individual suits.

In this instance, the municipality appointed a committee and received its report approvingly; it did not take the last step necessary to be effective by adopting a general ordinance.

There is another feature in this case attracting attention.

Those in charge of large industrial, transportation companies should not, when appealed to for relief, hold out a hope, as was done assuring those complaining that something will be done, and yet remain supinely indifferent.

It will not do to assure them that something will be done, and then remain content without making the least attempt at improving the situation.

Of course, transportation companies must not be taken by the throat and made to surrender to every demand; that would be shutting the wolf out at one door and admitting him in another.

On the other hand, in a suit for relief, the weight of the testimony should make it appear that everything in reason has been done to put an end to annoying and distressing smoke.

This has not been done, and under this decision something shall have to be done.

The defendant can remain where it is by applying up-to-date methods, or by the use of walls and flues, funnels, or other devices.

The smoke producing will be enjoined in some respects to prevent as far as possible the annoyance complained of.

The testimony regarding the whistling noise, owing to a slow valve on the engine or boiler, does not make up such a case as would justify injunction or removal.

The demand as to it will not be granted in this suit.

The law and the evidence being in favor of plaintiffs and interveners and against defendant, it is ordered, adjudged, and decreed that the judgment rendered in this suit is avoided, annulled, and reversed, except in particular last stated in this decree.

It is further ordered, adjudged, and decreed that the roundhouse and tracks leading into the roundhouse be so operated as not to cause volumes of smoke to expand to the houses of the plaintiffs and interveners, mentioned in their petition.

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It is further ordered, adjudged, and decreed that the smoke nuisance complained of in the petition, emitted by the roundhouse and by engines and boilers leading into the roundhouse, be abated.

It is further ordered, adjudged, and decreed that defendant erect smoke walls or stacks, or adopt other effective devices necessary to prevent the spreading of the smoke to an injurious extent toward the houses before mentioned.

The injunction is made perpetual to the foregoing extent.

It is decreed that the complaint of plaintiffs and interveners directed against the shrill whistling noise of the locomotive and the slow valves on said tracks is dismissed as in case of nonsuit.

It is further ordered, adjudged, and decreed that plaintiffs' rights to recover further relief as relates to smoke or avoidable noises, as occasion may require, are reserved.

It is further ordered, adjudged, and decreed that in other respects the judgment appealed from is affirmed, except that defendant and appellee shall pay the costs of both courts.

On Applications for Rehearing.

In the application for a rehearing, the defendant and appellant, in the alternative, asks us to change the judgment to allow defendant 90 days from the decree within which to comply with the requirements of the decree as to making alterations.

The delay is granted in accordance with defendant and appellee's prayer.

This change regarding time having been made by amending the decree, the application for a rehearing is refused, except as to the 90 days.

The application of plaintiffs and appellants for a rehearing is, also, refused.

WILLIAM A. WRIGHT, Comptroller General of the State of Georgia, the County of Wilkes, and the County of Taliaferro, Appts. v. GEORGIA RAILROAD & BANKING COMPANY.

(Argued January 11, 1910, Decided February 21, 1910.)

[30 Sup. Ct. Rep. 242.]

Taxation—Exemption—Duration—“And after That.”—The partial exemption from taxation under a charter provision that the stock of a railway company and its branches shall be wholly exempt for seven years, “and after that” shall be subject to a tax not exceeding a given per cent on the net proceeds of their investments, cannot be regarded as limited to the thirty-six years during which the company was to have exclusive rights within a defined territory, on the theory that the words “and after that” do not mean “thereafter,” and do not refer to the limitation immediately preceding, but to the thirty-six years’ limitation of the exclusive right regulated by the preceding part of the same section of the charter.

Taxation — Exemption — “Stock.” — Capital, in whatever form invested, appropriate to the purpose of the company, and not merely the shares held by stockholders, must be regarded as meant by the word “stock,” as used in a provision of a railway charter that the stock of the company and its branches shall be exempt from taxation for seven years, and after that shall be subject to a tax not exceeding a given per cent upon the net proceeds of their investments, in view of the recognition in other provisions of the charter of the distinction between capital stock and “shares,” and of at least sixty years’ legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, and of a series of decisions of the highest state court, holding either that the whole of the capital was exempt, in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock.

Judgment—State and Federal Courts.—A judgment of a state court sustaining the exemption claimed by a railway company under its charter from any taxation except one based on its net profits, which, under the local law of the state, is not res judicata as to taxes for other years than the one directly involved, can be accorded no greater efficacy in the Federal courts.

Taxation—Exemption—Capital Stock.—The excess of the value of a railway and its appurtenances over the nominal value of its authorized capital stock, the result of natural increase in the value of such property, and of renewals, alterations, and betterments made from time to time, is included in the partial exemption from taxation under the charter provision that the stock of the company and its branches shall be wholly exempt for seven years, and after that shall be subject to a tax not exceeding a given per cent on the net pro-

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ceeds of their investments, the legislative purpose being otherwise plain that the authorized capital be adequate to the construction and equipment of the roads.

Constitutional Law—Impairing Contract Obligations—Franchise Tax.—A tax upon the franchise of a railway company impairs the obligation of a charter exemption from any property tax other than one based on its net profits.

Taxation—Exemption—Consolidation of Corporations.—No immunity from taxation which did not then exist was conferred by Ga. act of January 21, 1852, authorizing the consolidation of the stocks of two railway companies under the name and style of one of such companies, which should continue to exercise all the powers and privileges conferred by existing law upon the corporation of that name, and be under all the liabilities and restrictions imposed upon it.

Taxation—Exemption—Charter Grant of Rights Equal to Other Corporations.—Incorporating a railway company with power to exercise all the powers and privileges conferred by an earlier act incorporating another railway company does not confer upon the new corporation the immunity from taxation enjoyed by the earlier company under its charter.

Appeal from the Circuit Court of the United States for the Northern District of Georgia to review a decree enjoining the collection of certain taxes upon the property of a railway company, which are alleged to impair the contract obligations of such company. Modified by excluding from the benefits of the charter exemption the property of a branch railroad acquired by consolidation, and, as so modified, affirmed.

See same case below, 132 Fed. 912.

The facts are stated in the opinion.

Messrs. John C. Hart, Samuel H. Sibley, Hooper Alexander, and Ligon Johnson for appellants.

Messrs. Joseph B. Cumming, Joseph R. Lamar, Alexander C. King, and King & Spalding, for appellee.

Mr. Justice LURTON delivered the opinion of the court:

This is a bill to restrain the enforcement of certain taxes imposed by the state of Georgia, which the railroad company claims to be in violation of a contract between itself and the state. The court below sustained the contention of the railroad company, and held that the scheme of taxation found in the charter of the company was of inviolable obligation, and enjoined any method of taxation conflicting with the stipulations of the charter; from this decree the comptroller has appealed.

The charter in question was granted by the state of Georgia in 1833,—a time long before the imposition of any restriction upon the power of the legislature of that state to stipulate for either an entire or partial exemption from taxation. It is, there-

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fore, not denied by the state that the charter constitutes a contract which may not be impaired by subsequent legislation. In view of this concession we are only called upon to decide the extent of the charter exemption, and, incidentally, its duration.

The controlling section of the charter is the fifteenth. The part now relevant is as follows:

"The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads, or any of them; and after that, shall be subject to a tax not exceeding $\frac{1}{2}$ of 1 per cent per annum, on the net proceeds of their investments."

The period of absolute exemption has, of course, long since passed. The only question is as to the duration and extent of the partial exemption which followed.

That the property exempt altogether for seven years is the same property subject to a limited tax thereafter was long ago decided by the supreme court of Georgia in a case which involved the interpretation of this very contract. *Augusta v. Georgia R. & Bkg. Co.*, 26 Ga. 651, 661, *et seq.* The question in that case was as to the legality of municipal taxes assessed by the city of Augusta upon that part of the capital of the company employed in its banking business and upon real estate situated in that city. The taxes were held illegal. Interpreting this section, that court said:

"It means, first, that the stock of the company was to be subject to a tax, but not to any tax exceeding $\frac{1}{2}$ of 1 per cent. on the net proceeds of its investments." Second. "That the stock of the company, as stock, as a unit, is alone what is to be subject to the tax; not parts of the stock, as the part used in banking, nor the particulars in which the stock consists, as, the land, cars, rails, etc." Third. "That this tax to which the stock is to be subject is to be a tax to be laid by the state."

We may as well turn to one side just here to deal first with the question of the duration of this commuted tax which is to follow the period of tax exemption, because we construe the words "after that," which immediately follow the exemption clause, as synonymous with "thereafter," and as fixing the time when that property which was theretofore exempt should be subject to the system of taxation provided by the succeeding clause.

It has been rather faintly urged that the duration of this commuted tax or partial exemption was limited to a term of thirty-six years after the completion of the railroad, and that this period has long since expired. This suggested limitation seems to have no other basis than that the words "and after that" do not mean "thereafter," as we have assumed, nor refer to the limitation immediately preceding, but to a more remote limitation found in the 2d section of the charter, and again in the

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earlier part of the 15th section. But the thirty-six-year limitation is one obviously applicable only to the grant of an exclusive right, within a defined territory, to construct and operate railroads. This was intended to protect this pioneer railroad from being paralleled within that time. The recurrence to this exclusive right in the first part of the 15th section is only for the purpose of placing a condition thereon which, as matter of fact, never happened, and which, therefore, never became vested, and to provide that the termination of that right should not otherwise affect the corporate existence, estate, powers, or privileges of the company. This reference to the exclusive right conferred first by the 2d section is followed by the provision above set out, providing that "the stock of the said company and its branches shall be exempt from taxation for and during seven years from and after the completion of said railroads, or any of them, and after that shall be subject to a tax not exceeding $\frac{1}{2}$ of 1 per cent. per annum on the net proceeds of their investment." "After that" obviously refers to the last limitation,—the termination of the exemption period,—and it would be an indefensible construction to construe the words as referring it to the thirty-six-year limitation of the exclusive right regulated by the preceding part of the same section.

Coming now to the question as to what is the meaning and scope of the partial exemption found in this clause, we are confronted, first, with the contention that only the shares in the hands of shareholders are within either the first or second clause of this contract, and that the entire property of the company is subject to the taxing power of the state, unaffected by any contract for any stipulated form of limited taxation. This claim is, of course, bottomed on the contention that "stock of the said company and its branches" refers to and means only the shares in the capital stock held by the shareholders, and that the benefit of the stipulation was intended for the shareholders in their character as such.

The word "stock" is not uniformly used to designate the capital of a corporation, although its primary meaning is capital, in whatever form it may be invested. Indeed, it is not at all unusual to find the word used synonymously with "shares," and meaning the certificates issued to subscribers to the company's stock. It is therefore important to look at the connection in which the word is used when an exemption or substituted method of taxation is involved, to see whether the legislative intent was to exempt the capital of the company, in whatever form invested, or the shares of stock in the hands of the shareholders. *Powers v. Detroit, G. H. & M. R. Co.*, 201 U. S. 543, 559, 50 L. ed. 860, 865, 26 Sup. Ct. Rep. 556. There is an obvious distinction between the capital stock of an incorporated company and the "shares" of the company. The one is the capital upon which the business is to be undertaken, and is represented by the

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property of every kind acquired by the company. Shares are the mere certificates which represent a subscriber's contribution to the capital stock, and measure his interest in the company. The charter, plainly enough, recognized this. Thus, in the 3d section, it is provided that "the stock of the company * * * shall consist of 15,000 shares of \$100 per share, and the said company to be formed on that capital." By a later section the times and places for taking subscriptions are defined, "so that, on summing up the whole, it may appear whether the stock is filled up, or falls short of the aforesaid capital." In the 7th section we find the interest of the subscribers to the "stock" recognized and described as shares, while the capital of the company in which he holds such shares is described as "the stock of the said company." Thus, each subscriber is given "a number of votes equal to the number of shares he may hold in the stock of the company." That "stock," as used, means "capital," in whatever form invested, appropriate to the purpose of the company, is also plainly evidenced by the provision that, after the total exemption period, this stock shall be subjected to a specific tax "on the net proceeds of their investments." It has been suggested that by "their investments" was meant the investments of the shareholders in the company's stock. This interpretation is based upon the use of the plural "their;" but in many places in this same charter the company is referred to in the plural. As this same act provides for the organization of one or more companies to construct branch lines, and extends to them the same tax exemption, it is grammatically correct to read "their" as referring to this plurality of companies. That "stock" in the first clause means capital, and "their investments," the property into which the company's capital has gone, seems, in any view you take of it, the most rational interpretation of the matter. That the only mode of taxation stipulated for after the period of total exemption is a tax upon the net income of the company's property is seemingly the plain and obvious meaning of this contract. That this is the way in which it has been read and interpreted by everybody who has had to do with the matter of taxation in an official way since 1845, when the railroad seems to have been finished, affords strong evidence that this construction accords with the intent of the charter. Aside from at least sixty years of legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, there has been a series of cases decided by the supreme court of Georgia which involved the meaning of this clause. In each case the court has held, either, that the whole of the capital was exempt, in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock. *Augusta v. Georgia R. & Bkg. Co.*, 26

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Ga. 651, 662, *et seq.*; *State v. Georgia R. & Bkg. Co.*, 54 Ga. 423; *Goldsmith v. Georgia R. Co.*, 62 Ga. 485.

In the case of *State v. Georgia R. & Bkg. Co.*, cited above, the court held that the act of 1874, which sought to assess an ad valorem tax against the property of the railroad company, was void, as in violation of the obligation of a contract by which the state was limited to a tax which should not exceed 1 per cent. "on its earnings." *Goldsmith v. Georgia R. Co.* is relied upon as overruling the earlier case. But this is a mistake for more than one reason. That case was dismissed for want of jurisdiction over the subject of the legality or illegality of the tax resisted. Hence, all that was said about the taxability of the appellee's property under this charter exemption was obiter. But so far as the question of the applicability of this partial exemption to the capital of the company, as invested in its railroad, is concerned, the opinion distinctly accepts the former case as a settlement of the question. Referring to the former case, Mr. Justice Bleckley said:

"It seems to have been the purpose of this court to hold in 54 Ga. 423, that, except as to stock issued under the amendment of 1868, authorizing the Clayton branch, the limit put by the charter of the Georgia Railroad & Banking Company upon the taxing power, extends to all the capital stock of the corporation as a railroad company, and is irrepealable. These questions were fairly involved in that case, and the adjudication of them there announced ought to be accepted as final."

That Mr. Justice Bleckley afterward concluded that the former case had not considered or decided whether any excess of value of property over the amount of the authorized and exempt capital would be subject to an ad valorem tax is true; but that does not detract from the recognition of the former as an authoritative opinion upon the point that the exemption was of the capital of the company.

We come now to the question as to whether so much of the value of the company's railroad and appurtenances as exceeds in value the amount of the authorized capital stock, under the charter and amendments prior to 1863, is subject to taxation as other property of like character, under the law of the state. This value "it is admitted exceeds by four millions of dollars the nominal value of the capital stock of said company," which excess, it is further conceded, has been "the result of natural increase in the value of said property, and by renewals, alterations, and betterments of the same, from time to time, by said company."

That this is the true and proper method of taxation, admissible under the charter exemption, has been urged upon several grounds. First, it is said that this construction was given this very charter in *Goldsmith v. Georgia R. Co.* heretofore cited,

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and the appellants plead the judgment in that suit as *res judicata*. Confessedly, if this is a good plea, it must operate not only for the purpose for which it has been interposed, but will be entirely fatal to the claim that the exemption now in question has expired, or that it extended only to the shares in the hands of shareholders.

The opinion in that case does so construe the exemption, but, as we have already shown, the case went off wholly upon the question as to whether the trial court had any jurisdiction of the question, and the opinion, after construing the clause here involved, passed on to this matter as to whether the question could be made under the statutory remedy resorted to by the company, and concluded by holding that, whether the railroad company had been taxed illegally or not, the court below ought to have dismissed the proceeding for want of jurisdiction, and that the remedy, if any, was by bill in equity. Accordingly, the judgment which the supreme court entered was one which reversed the judgment below, and directed that the proceeding be dismissed for want of jurisdiction. This judgment in no way involved the construction of this exemption contract, nor the liability of the Georgia Railroad Company to taxation upon its property, or otherwise, and does not, therefore, have any efficacy as an estoppel. There was therefore no error in the ruling of the circuit court that this plea was bad. Upon the other hand, when the plea of estoppel just disposed of came in, the complainants amended their bill and set up the judgment in the earlier case of *State v. Georgia R. & Bkg. Co. supra*, as an adjudication concluding not only the claim that the exemption was only of the shares in the hands of shareholders, but as an adverse decision of this claim that only so much of the "investments" of the company were exempt from a general ad valorem tax as equalled in value the authorized capital stock of the company under the charter and amendments prior to 1863.

But in *Georgia R. & Bkg. Co. v. Wright*, 124 Ga. 596, 53 S. E. 251, the supreme court of Georgia seems to have definitely decided that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must be also decided.

This court, as is well settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered. *Union & Planters' Bank v. Memphis*, 189 U. S. 71, 47 L. ed. 712, 23 Sup. Ct. Rep. 604; *Covington v. First Nat. Bank*, 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 562.

We shall therefore disregard this plea, and determine the matter upon its merits, giving to the decision of the Georgia court consideration only as an authority.

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Coming, then, to the question on its merits: Under the original charter and certain amendments there exists to-day an authorized capital stock of \$4,156,000. This leaves out of account a small increase under a later act, aggregating 440 shares, which capital is subject to taxation and is not now in dispute. The railroad property, including its railway, depots, equipments, and appurtenances proper, has a present value of some four millions of dollars in excess of the authorized capital. Now the contention is that, to the extent of this excess, the property of the company is assessable and taxable as other property. There is not much to be gained by the reference to *Farrington v. Tennessee*, 95 U. S. 687, 24 L. ed. 560, and *Bank of Commerce v. Tennessee*, 161 U. S. 134, 137, 40 L. ed. 645, 647, 16 Sup. Ct. Rep. 456, where something is said in an argumentative way about the taxability of a bank's surplus whose capital was exempt. That might well be if the bank should choose to enlarge its actual capital in the business by using profits as capital instead of distributing them as profits to the shareholders, where the exemption was of a specific amount of capital. The facts in this case are so different from the case presented of a bank's surplus as to make the illustration of little value, even if it were settled that in all cases a bank's surplus would be taxable although its capital was exempt. We have here nothing which corresponds very closely to a bank's surplus. An investment made nearly seventy-five years since, of \$4,156,000, has now a value of \$4,000,000 in excess of that cost. The property is the same property. The conceded fact is that through renewals, alterations, and betterments made from time to time, and the natural increase in the value of the road, this appreciation has come about. There has been no suggestion that there has been any hiding away of capital added, by either new stock, or by the use of bonds or other forms of credit, nor that the improvements made from time to time, called "renewals, alterations, and betterments," have been other than the necessities of an enlarging business and the improved maintenance naturally demanded. There is no suggestion that there has been any bad faith in covering up taxable assets under cover of assets immune. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 506, 38 L. ed. 793, 800, 14 Sup. Ct. Rep. 968.

After all, the precise question is whether the legislative purpose, as expressed, was that the railroad incorporated should pay no tax except one based upon net profits of operation, or was it the intention that a specific amount of capital only should be so relieved? Undoubtedly, the state did not intend that any other capital than that authorized and invested directly in this specific railroad should be immune. That is plain by the express limitation of the charter. But is there any contingency under which this particular railroad is to be subject to any other

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taxation than one measured by the amount of its net profits? The contract, though one for a partial exemption from taxation, may nevertheless be read in the light of the purpose sought to be accomplished and the public policy entertained at the time. That is true of this as well as other contracts; namely, that the meaning may be discovered by regard to attendant circumstances. That the intent was to exempt a capital aggregating \$4,156,000, is, for the purpose of the present question, the necessary foundation of the claim now being looked at. That was, at the beginning, mere subscribers' promises to pay; next, money in the treasury of the company. While money, the charter says, it may, until needed, be invested "in the public stock of the United States or of the state of Georgia." But this capital was intended to be the only means by which this line of railroad was to be constructed and equipped. Thus, the original capital was fixed at one and a half million dollars, with power to enlarge same, "so as to make their capital adequate to the work." This power of increase does not seem to have been regarded as clear enough, and when an authorized extension of the work demanded more capital the charter was amended so as to increase it to \$4,000,000, "to meet excess of cost of road over present capital." To insure the completion of the authorized road within the limit of the fixed capital, it was provided that the engagements of the company should not exceed the company's capital, and that the officers and directors who should contract beyond that capital should be jointly and severally liable to the contractors and to the corporation. Finally, no power was given to issue bonds, the usual incident to any modern railway construction. From the plain purpose that this authorized capital should be adequate to the construction and equipment of a particular railroad, it is plainly inferable that that railroad should be subject, after a time of complete immunity, only to a tax upon the profit of its operation. That railroad is the product of the investment of the authorized capital, and is, as such, subject only to a tax based upon its "net proceeds." This plan of tax upon net earnings is quite inconsistent with any other form of taxation, and is absolutely independent of any question as to whether the property thus taxed only upon its profits should have a less or greater value than the capital invested. A tax upon earnings is a tax which at last covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of its franchises. It is not to be presumed, in the light of the public policy of the time, that the state intended that this pioneer railroad should be subjected to any form of taxation of property which produced the taxable income. *State v. Western & A. R. Co.*, 66 Ga. 563, 567.

We are therefore of opinion that this property is not sub-

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ject to any other method of taxation than that of the special system stipulated for by the contract, and that the act of the Georgia legislature, in so far as it provides for an ad valorem tax upon any part of this invested capital of the Georgia Railroad & Banking Company, does impair the obligation of the contract.

But it is said that the tax, so far as imposed upon the franchise of this company, is not in derogation of the charter, and that the decree below should be modified in this particular.

If we are right in construing the tax as one upon net income as a substitute for a property tax, the franchise may no more be taxed than any other property appropriate to the operation of the road. When the state gave up the right to levy and collect a property tax, and to take in substitution a tax upon the annual net profit, it gave up the right to tax the franchise of the company as certainly as it gave up the right to tax its railroad. The Georgia act taxing franchises treats the franchise as property, and requires that "they shall be returned and valued in the same way as returns are made by railroads of their physical property * * *". And that "all franchises of value shall be returned for taxation and taxed as other property." That a law which imposes a tax upon the franchise of a railroad company whose property is exempt from taxation is a law in derogation of the exemption contract is well settled. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 67, 77, 46 L. ed. 89, 91, 22 Sup. Ct. Rep. 26.

Included in the total mileage owned and operated by the appellee railroad company is a line 18 miles long, known as the Washington branch. The company has all along claimed that this branch road was within the partial exemption clause of its original charter, granted in 1833. So far as appears from this transcript, this claim has not before been challenged, though no distinct issue seems ever to have been made in respect to its exclusion by reason of the legislation under which that branch was acquired. Neither does the answer of the comptroller in this case claim or set out any difference between the tax exemption applicable to the other parts of the appellee's railroad and this Washington branch, and the decree of the court below expressly finds that the original charter exemption includes this Washington branch. But the general denial that any part of the property of the railroad company was exempt from ad valorem taxation may well be regarded as covering the parts which make up the whole. To the decree holding the Washington branch exempt, the comptroller has moreover assigned error, based upon the legislation under which that branch was constructed. The right of exemption claimed for this branch was, however, distinctly put in issue by the counties of Wilkes and Talliaferro, which, for this purpose, were allowed to intervene,

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having a direct interest due to the fact that that branch, passing through those counties, would be subject to county taxation if not within the tax exemption clause. These counties have appealed from the decree below and assigned error also.

The first legislative enactment in regard to the construction of the Washington branch road seems to have been in the act of 1833; but nothing was ever done under that. The same may be said in reference to another act passed in 1836. In December, 1848, an act was passed in these words:

"The power heretofore granted to the Georgia Railroad & Banking Company to construct a branch of their road to Washington, in the county of Wilkes, be, and the same is hereby, revived and authorized to be exercised by said company, provided that the amount of the increased stock of said company (\$200,000) shall not be exempt from taxation as is secured to the present stock by the latter clause of the 15th section of the charter of said company, but shall be subject to such tax as the legislature may hereafter impose."

But this was a section in an act amending the charter, and was never accepted. See 26 Ga. 651, 654. At the same legislative session, on February 5, 1850, another act was passed in these words:

"That [naming incorporators] be and they are hereby authorized to build, construct, and keep a plank or railroad from the town of Washington, in Wilkes county, to some point on the Georgia Railroad & Banking Company's railroad, and for that purpose shall be authorized to create and receive by subscription a capital stock not exceeding \$200,000, and shall be authorized to exercise all the powers and privileges conferred by the act of the general assembly passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

So far as we can discover, the only legislative authority for the construction or acquirement of a branch railroad to Washington, accepted or acted under by it, is found in the act of January 21, 1852, entitled, "An Act to Authorize the Consolidation of the Stocks of the Georgia Railroad & Banking Company and of the Washington Railroad or Plank Road Company, Incorporated February the Fifth, Eighteen Hundred and Fifty, and for Other Purposes." The 1st section of that act provides:

"That the Georgia Railroad & Banking Company and the Washington Rail or Plank Road Company be authorized and empowered to consolidate their stocks, the said Georgia Railroad & Banking Company issuing stocks in their said company to the stockholders of the Washington Railroad or Plank Road Company, on terms of equality with the general stockholders, in amount equal to the amount held by them respectively in the stock of the Washington Railroad or Plank Road Company,

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and that the two companies aforesaid, after the consolidation of their stocks, shall be known as one corporate body, under the name and style of the Georgia Railroad & Banking Company, and that said corporate body shall be authorized to exercise all the powers and privileges conferred by existing laws upon the Georgia Railroad & Banking Company, and be under all the liabilities and restrictions imposed on the same."

That this consolidation neither extinguished the Georgia Railroad & Banking Company, nor deprived it of any of its powers, privileges, or immunities, is plain. No such result has been claimed. Nor is it claimed that it thereby lost any tax exemption which it then had. The act authorizing the consolidation is substantially like that under which the Central Railroad & Banking Company was consolidated with the Macon Railroad, considered in *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757, where it was held that the tax exemption which the Central Railroad had enjoyed continued after consolidation in respect of the property of that company, but that, as the Macon company, consolidated with it, had no exemption, its property continued subject to taxation. That the Washington Railroad or Plank Road Company would go out of existence when this merger was accomplished is plain; it was, indeed, absorbed by the Georgia company. The purpose was to vest in the latter all of the rights, powers, and privileges of the merged company without diminishing or enlarging them. See what is said by Chief Justice Fuller in commenting upon a similar merger in *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 300, 36 L. ed. 972, 980, 13 Sup. Ct. Rep. 72.

Did the Washington Railroad, before consolidation, possess any contract tax exemption?

The claim that it did is based upon the provision in the act under which it was incorporated, providing that it should "be authorized to exercise all the powers and privileges conferred by the act of the general assembly, passed in the year 1833, to incorporate the Georgia Railroad Company, and shall be under all the liabilities and restrictions therein contained."

The question, then, is whether, under the power "*to exercise all the powers and privileges* [*italics ours*] conferred by" the act incorporating the Georgia Railroad Company, the immunity from any other tax than one based upon a given per cent. of annual net profits was granted to that company. The affirmative of this proposition finds some support in the cases of *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note, 23 L. ed. 762, and *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649. In later cases this doctrine of a legislative transfer of a tax immunity under the term franchise, powers, estates, or privileges

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was questioned. Thus, in *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813, a tax immunity was held not to pass under a mortgage foreclosure sale, under the provision of a statute which authorized the purchaser to become a corporation, and "succeed to all such franchises, rights, and privileges" pertaining to the mortgagor company. In *Picard v. East Tennessee, V. & G. R. Co.*, 130 U. S. 637, 642, 32 L. ed. 1015, 1053, 9 Sup. Ct. Rep. 640, 642, it was held that such an immunity would not pass to a purchasing company under a decree enforcing a statutory lien, where the sale, as confirmed, was of the "property and franchises" of the mortgagor company. In that case it was said:

"It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better, opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 297, 36 L. ed. 972, 979, 13 Sup. Ct. Rep. 72; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; and *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471, the earlier cases were also much shaken, so far as they tended to establish that a tax exemption would be transferred by legislative enactment conferring upon one road the powers or franchises or privileges of another, in the absence of other language or pregnant circumstances, showing a plain intent to confer such exemption.

But whatever doubt upon this subject may have existed as to the effect of the transfer to one company of the powers and privileges of another in conferring a tax exemption possessed by the latter is set at rest by *Rochester R. Co. v. Rochester*, 205 U. S. 236, 252, 51 L. ed. 784, 791, 27 Sup. Ct. Rep. 469, 474. Mr. Justice Moody, after reviewing all of the cases referred to above and others, sums the matter up by saying:

"We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the 'privileges' of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity."

There is an absence of anything in the history of this branch railroad which points to a purpose to grant any exemption from taxation. Thus, in the act of December 20, 1849, reviving the authority of the Georgia Railroad & Banking Company to construct such a branch, originally authorized by earlier acts, it was expressly provided that the stock to be issued for the pur-

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pose "should not be exempt from taxation, as is secured to the present stock by the later clause of the 15th section of the charter of said company," etc. This provision was probably the very reason why the Georgia Railroad & Banking Company did not accept or act under that statute. At the same session of the legislature, an independent company was created to construct and operate the same branch road. Presumably with the knowledge of the fact that the Georgia Railroad & Banking Company could not itself construct this road with immunity from taxation, this act authorizing this new corporation to build the same branch, declared that this company should be "authorized to *exercise*" [italics ours] "all powers and privileges" conferred by the act originally creating the Georgia Railroad & Banking Company. It is one thing to have authority to "exercise" all the "powers and privileges" of another company, and another thing to enjoy an exemption from taxation. The "*exercise*" of the "powers and privileges" of the company referred to was reasonably essential to the construction and operation of the independent railroad. Its immunity from taxation was not. See 146 U. S. 279, 295, and Merchants' Nat. Bank v. United States, 101 U. S. 1, 25 L. ed. 979. The power of taxation is never to be regarded as surrendered or bargained away if there is room for rational doubt as to the purpose.

We conclude, therefore, that the Washington Railroad or Plank Road Company had no exemption from taxation at the time this consolidation occurred. That the consolidating act did not intend to confer any immunity from taxation which did not then exist is plain. The object was to vest in the Georgia company the property and franchises and rights and privileges of the Washington company. When the Georgia company succeeded to its property and franchises, it did so subject to whatever right the state had in the matter of taxation. The case in this aspect is controlled by Central R. & Bkg. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757.

The decree of the court below is modified so as to exclude the 18 miles constituting the Washington Branch Railroad, but in all other respects it is affirmed. The costs of this appeal will be divided between Wright, Comptroller General, and the Georgia Railroad & Banking Company.

Affirmed.

SOUTHERN RAILWAY COMPANY, Plff. in Err., v. SAMUEL E. GREENE.

(Argued December 16, 17, 1909, Decided February 21, 1910.)

[30 Sup. Ct. Rep. 287.]

Constitutional Law—Equal Protection of the Laws—Foreign Corporation—Franchise Tax—"Person."—A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is a person within the jurisdiction of the state, and, as such, is protected by the equal protection of the laws clause of U. S. Const., 14th Amend., against the imposition, under 1 Ala. Code 1907, §§ 2391-2400, of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business.

In error to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Birmingham City Court in that state, sustaining a demurrer to the complaint in an action by a foreign railway company to recover back the amount of a franchise tax alleged to have been wrongfully exacted. Reversed.

See same case below (Ala.) 49 So. 404.

Statement by Mr. Justice DAY:

Action was brought in the city court of Birmingham, Alabama, by the Southern Railway Company, to recover the sum of \$22,458.36, for so much money received by the defendant as judge of the probate court of Jefferson county, Alabama, which sum the plaintiff claimed was wrongfully exacted from it under the provisions of the act of March 7, 1907. This sum is the amount taxed against the Southern Railway Company under the said legislative act, and, under the practice in Alabama, if illegally exacted, it may be recovered.

This act is found in the Code of Alabama of 1907, vol. 1, page 986, §§ 2391 to 2400, inclusive. It provides for the payment of an annual franchise tax to the probate judge by every foreign corporation authorized to do business within the state, in which it has a resident agent, with certain exceptions, for the use of the state, upon the actual amount of the capital stock employed by it in the state; in the amount of \$25 on the first \$100, 5 per cent on the next \$900, and 1-10 of 1 per cent on all the remaining amount of capital so employed.

Provision is made for the assessment of the tax by proceedings before the probate judge, with an appeal to the circuit

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court in certain cases. The statute enacts that no foreign corporation required to pay a tax under this statute shall do any business in the state of Alabama not constituting interstate commerce, or maintain or commence any action in any of the courts of the state, upon contracts made in the state other than contracts based upon interstate commerce, unless such corporation shall have paid said tax within sixty days after the same shall have become due. The payment of the tax in one county shall be sufficient, notwithstanding the corporation shall do business or have a resident agent in more than one county.

The payment of the franchise tax required by this statute does not exempt any corporation paying the same from payment of the regular license or privilege tax specified or required for engaging in or carrying on business, the license for which is required from individuals, firms, or corporations. In addition to the amount of the franchise tax required to be paid to the state, such foreign corporation shall pay to the county, for the use of the county, an amount equal to one half of the amount paid by it to the state. Loans of money upon which a mortgage tax is paid are deducted from capital employed in the state upon which there shall be paid the recording privilege tax required by law.

The complaint averred that the act is unconstitutional and void, as it impaired the obligation of a contract between the plaintiff and the state of Alabama, and in that it deprived the plaintiff of its property without due process of law, and denied to it the equal protection of the laws.

Plaintiff averred that it is a corporation created under the laws of the state of Virginia, and as such authorized to lease, use, operate, and acquire any railroad or transportation company, then or thereafter incorporated by the laws of the United States, or any of the states thereof. That it thus organized, in February, 1894, and has since carried on the business of acquiring, owning, and operating lines of railroads in various states, and conducting interstate and intrastate transportation of persons and property. That, in conformity with the laws of the state of Alabama, on July 16, 1894, it filed in the office of the secretary of state a copy of its charter, and designated an agent upon whom service could be made, and that, at the same time, it paid to the treasurer of the state of Alabama the sum of \$250, being the sum required as a license fee for beginning business in the state. It avers that, after thus complying with the laws of Alabama, it commenced carrying on its authorized business within the state, and has therein carried on the same business ever since; that between the time of entering the state, as aforesaid, and the year 1899, it purchased and acquired, as permitted and authorized by the laws of Alabama, various lines of railroad and the franchises under which they had been built

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and operated, which lines are connected with, and continuous with, other lines owned by the plaintiff.

The complaint states that these lines of railroad, situated in the state of Alabama, had been theretofore constructed under its laws by duly authorized corporations, and the complaint contains a list of such lines; that it acquired said lines, paying large sums of money therefor, in pursuance of and reliance upon the laws of the state of Alabama, that since such acquisition it has continued to operate such lines of railroad, transacting a large amount of business thereon, both interstate and intrastate, and has expended large sums of money in the maintenance and improvement thereof.

Plaintiff avers that, from time to time, ownership taxes, similar to those assessed against other persons and corporations, have been assessed against it, all of which the plaintiff has paid. It has also paid from year to year the license tax exacted of it and other persons and corporations operating railroads in the state of Alabama under § 3489 of the Code of Alabama of 1896, under § 1128 of the Code of Alabama of 1886. It has also paid on account of its ownership of such railroad, taxes assessed against it under the act of March 7, 1897, taxing the franchises of intangible property, in the state, of every person and corporation engaged in transporting persons or property over any railroad therein. It has also paid the license fee, and has procured the license provided for by the act of the legislature of the state of Alabama, approved March 7, 1907, entitled, "An Act to Further Regulate the Doing of Business in Alabama by Foreign or Nonresident Corporations, or Corporations Organized under or by Authority of the Law of Any Other State or Government than the State of Alabama, and to Fix a Punishment for the Violation Thereof."

Plaintiff states that all these exactions have been made by the state of Alabama upon corporations owning and operating railroads in Alabama, without regard to whether the corporation owning and operating such railroad was a domestic corporation or a corporation organized under the laws of some other state, with the sole exception of the license fee last above mentioned, which is a nominal amount (\$10 per annum), is exacted from foreign corporations only, for mere police purposes, in order that there may be a registration of such foreign corporations, doing business in Alabama, in the office of the secretary of state. Plaintiff avers that the legislative act of March 7, 1907, under which it was compelled to pay the said sum of \$22,458.36, does not apply to persons or corporations of the state of Alabama owning the same character of property and carrying on the same kind of business as is owned and carried on by corporations organized under the laws of other states, nor is there any similar exaction against domestic corporations owning such property and engaged in the same character of business.

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Plaintiff recites the proceedings before the probate judge of Jefferson county, resulting in the finding that the capital of the plaintiff employed in the state of Alabama was \$14,903,246, and the assessment thereon of the tax of \$22,458.36, as aforesaid, its payment under protest, and prays judgment for its recovery. A demurrer to the complaint was sustained and judgment rendered for defendant. Upon appeal, the supreme court of Alabama affirmed the judgment. 49 So. 404.

Messrs. Alfred P. Thom, Alexander P. Humphrey, James Wcatherly, and Humphrey & Humphrey, for plaintiff in error.

Messrs. Alexander M. Garber, Samuel D. Weakley, and Henry C. Selheimer, for defendant in error.

Mr. Justice DAY delivered the opinion of the court:

The supreme court of Alabama placed its decision upon the ground that the act of March 7, 1907, should be sustained as a lawful tax, not upon the franchises of a foreign corporation, as property, but as a tax "to add to the license tax already required an additional privilege tax for the continued exercise of the corporate franchises in the state." 49 So. 408.

The errors assigned attack the validity of the act of March 7, 1907, upon grounds, among others, that it violates the 14th Amendment of the Federal Constitution, in that it denies to the plaintiff the equal protection of the laws, and deprives it of its property without due process of law.

The 14th Amendment provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The important Federal question for our determination in this case is: When a corporation of another state has come into the taxing state, in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is it liable to a new and additional franchise tax for the privilege of doing business within the state, which tax is not imposed upon domestic corporations doing business in the state of the same character as that in which the foreign corporation is itself engaged?

The Federal Constitution, it is only elementary to say, is the supreme law of the land, and all its applicable provisions are binding upon all within the territory of the United States. Whenever its protection is invoked, the courts of the United States, both state and Federal, are bound to see that rights guaranteed by the Federal Constitution are not violated by legislation of the state. One of the provisions of the 14th Amendment, thus binding upon every state of the Federal Union, pre-

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vents any state from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute, as it is interpreted and sought to be enforced in the state of Alabama, deprives the plaintiff of the equal protection of the laws, it cannot stand.

The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation.

That a corporation is a person, within the meaning of the 14th Amendment, is no longer open to discussion. This point was decided in *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, wherein this court declared:

"The inhibition of the Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of 'person' there is no doubt that a private corporation is included."

And see *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, and cases cited on p. 154.

Is the plaintiff corporation a person within the jurisdiction of the state of Alabama? In the present case, the plaintiff is taxed because it is doing business within the state of Alabama. The averments of the complaint, admitted by the demurrer, show it has acquired a large amount of railroad property by authority of, and in compliance with, the laws of the state; that it is subject to the jurisdiction of the courts of the state; that it has paid taxes upon its property, and also upon its franchises within the state; in short, that it came into the state in compliance with its laws, and, at the time of the imposition of the tax in question, had been for many years carrying on business therein under the laws of the state. We can have no doubt that a corporation thus situated is within the jurisdiction of the state. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

The argument on the part of the state of Alabama places much weight upon the cases in this court which have sustained the right of the state to exclude a foreign corporation from its borders, and to impose conditions upon the entry of such corporations into the state for the purpose of carrying on business therein. That line of cases has been so amply discussed in the opinions and concurring opinions in the cases of *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, decided at

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the present term [216 U. S. 1, 56, ante, 190, 232, 30 Sup. Ct. Rep. 190, 232], that any extended discussion of them is superfluous now. It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission to the state of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that state, nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the state of Alabama, with the permission of the state, and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the permission and sanction of the laws of the state. This feature of the case was dealt with by Mr. Justice Brewer, then a circuit judge, in the case of *Ames v. Union P. R. Co.*, 64 Fed. 165, 177, wherein he said:

"It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

Notwithstanding the ample discussion of the questions involved in the case of the *Western U. Teleg. Co. v. Kansas* and *Pullman Co. v. Kansas*, to which we have already referred, we deem it only fair to the learned counsel for the state of Alabama to notice some of the cases which it is insisted have disposed of the question herein involved, and maintained the right of the state to impose a tax upon a foreign corporation, lawfully within the state, for the privilege of doing business in the state, when no such tax, or one less burdensome, is imposed upon domestic corporations engaged in the same business. The first case referred to is *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972, in which a tax was sustained upon a foreign insurance company which had come into the state upon complying with certain terms prescribed by the state, and was thereafter subjected to a tax on all their premiums, the statute declaring it unlawful in the companies otherwise to do business in the state. It is sufficient to say of that case that it arose before the 14th Amendment had become part of the Federal Constitution, and that no reference is made in the opinion of the court to the 14th Amendment, although the case was decided after that Amendment went into effect.

In *New York v. Roberts*, 171 U. S. 662, 43 L. ed. 323, 19 Sup.

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Ct. Rep. 58, a tax was imposed upon the franchises or business of corporations, with certain exceptions, computed upon the amount of capital stock employed within the state. It was pointed out by Mr. Justice Shiras, who delivered the opinion of the court, that the tax was imposed as well for New York corporations as for those of other states, and he said: "So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other states, to the detriment of the latter, or to subject property out of the state to taxation."

In *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403, the tax imposed was applicable alike to corporations doing business in New York, whether organized in that state or not; and in the course of the opinion in the case Mr. Justice Field, speaking for the court, said: "It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108, a Pennsylvania corporation which was taxed in the state of New York was subjected to a license fee, which license ran for a period of a year, and it was held that the state had the power to change the conditions of admission to the state, and to impose as a condition of doing business in the state, at any time or for the future, the payment of a new or further tax. Mr. Justice Blatchford, speaking for the court, said: "If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state, or within its jurisdiction. It is outside at the threshold, seeking admission, with consent not yet given."

We have adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them. It would not be frank to say that there is not much said in the opinions in those cases which justifies the argument that the power of the state to exclude a foreign corporation, not engaged in interstate commerce, authorizes the imposition of special and peculiar taxation upon such corporations as a condition of doing business within the state. But none of the cases relied upon presents the question under the conditions obtaining in the case at bar. We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business.

As we have already indicated, the discussion of the question herein involved has largely been anticipated in the recent cases

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from Kansas, involving the right to tax the Western Union Telegraph Company and the Pullman Company. Those cases are the latest declaration of this court upon the subject, and in one aspect of them really involve the determination of the case at bar. In the Western U. Teleg. Case, it was held that a state could not impose a tax upon an interstate commerce corporation as a condition of its right to do domestic business within the state, which tax included within its scope the entire capital of the corporation, without as well as within the borders of the state. The Kansas tax was sought to be sustained as a legal exaction for the privilege of doing domestic business within the state. It was held invalid because it violated the right secured by the Constitution of the United States, giving to Congress the exclusive power to regulate interstate commerce, and because it violated the due-process clause of the Federal Constitution in undertaking to make the payment of a tax upon property beyond the borders of the state a condition of doing domestic business within the state. In that case, the 14th Amendment was directly applied in the due-process feature. In this case, we have an application of the same Amendment, asserting the equal protection of the laws.

We therefore reach the conclusion that the corporation plaintiff, under the conditions which we have detailed, is, within the meaning of the 14th Amendment, a person within the jurisdiction of the state of Alabama, and entitled to be protected against any statute of the state which deprives it of the equal protection of the laws.

It remains to consider the argument made on behalf of the state of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the 14th Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax imposed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 155, 165, 41 L. ed. 666, 668, 671, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting*

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v. Godard), 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

It is averred in the complaint, and must be taken as admitted, that there are other corporations of a domestic character in Alabama, carrying on the railroad business in precisely the same way as the plaintiff. It would be a fanciful distinction to say that there is any real difference in the burden imposed because the one is taxed for the privilege of a foreign corporation to do business in the state, and the other for the right to be a corporation. The fact is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the 14th Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution.

The judgment of the Supreme Court of Alabama is therefore reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

Dissenting: The Chief Justice, Mr. Justice McKenna, and Mr. Justice Holmes.

LOUISIANA & A. RY. CO. v. LOUISIANA RY. & NAVIGATION CO.

(Supreme Court of Louisiana, Feb. 28, 1910.)

[51 So. Rep. 712.]

Eminent Domain—Property Subject to Expropriation.*—A railroad spur track, not devoted to public use, is subject to expropriation by another corporation, the same as the property of individuals.

Eminent Domain—Necessity for Exercise.—The necessity for the exercise of the right of eminent domain must be understood in a reasonable sense, with due regard to the needs of the plaintiff corporation and all the elements of judicious selection. The objection that other property should be taken furnishes no test for the necessity for expropriation in ordinary cases.

Mortgages—Right of Way on Mortgaged Land—Right of Mortgage.—The grant of a right of way for a spur track on lands already specially mortgaged is necessarily subject to the right of the mortgagees to foreclose and sell the property free of such servitude.

Railroads—Contract for Spur Track—Rights of Railroad.—Where a spur track was constructed to a factory at the joint expense of its owner and the defendant railroad, and the factory was subsequently destroyed by fire, and the owner was forced into insolvency, and the property sold to pay prior mortgages, held, that the rights of the defendant under the contract were restricted to a removal of its track from the premises.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas F. Bell, Judge.

Action by the Louisiana & Arkansas Railway Company against the Louisiana Railway & Navigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise, Randolph & Rendall, for appellant.

Pugh, Thigpen & Hcroid, for appellee.

LAND, J. The plaintiff company sued to expropriate whatever interest the defendant company may have in a certain spur track and right of way in order to reach its terminals in the city of Shreveport.

Plaintiff company alleged that it had acquired title to the tract of land occupied in part by said spur track, which had

*For the authorities in this series on the right to condemn property belonging to a railroad, see last paragraph of last foot-note of *State v. Superior Court of King County* (Wash.), 33 R. R. R. 423, 56 Am. & Eng. R. Cas., N. S., 423; first foot-note of *Louisville & N. R. Co. v. City of Louisville* (Ky.), 33 R. R. R. 117, 56 Am. & Eng. R. Cas., N. S., 117.

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been originally constructed as a private enterprise for the use and benefit of the Queen City Furniture Manufacturing Company, the former owner of the said tract; that the buildings of the said company were destroyed by fire more than a year before the institution of the suit; and that said spur had never been used for public purposes.

Plaintiff made part of its petition another petition in an injunction suit, in which it was alleged that the tract in question had been sold under foreclosure of special mortgages antedating the acquisition of defendant's right of way, and that the purchaser at the judicial sale had sold said tract to the vendors of the plaintiff.

The answer denied the right of the plaintiff to expropriate said spur track and right of way, on the ground that the same was dedicated to public use as a part of defendant's railroad system, and also denied the necessity of the proposed expropriation on the ground that the same could be avoided by a change of the proposed location of plaintiff's roadway.

There was a verdict and judgment in favor of the plaintiff for the strip of land, on the payment of the sum of \$1,000. Defendant has appealed.

On February 3, 1905, the said furniture company mortgaged the tract in question and other lands to secure the payment of notes aggregating \$50,000. On April 7, 1905, the same company executed a mortgage on the same property to secure the payment of notes aggregating \$20,000.

On May 1, 1905, the same corporation entered into an agreement with the defendant for the construction and operation of the spur track in question. There seems to have been very little use made of this spur track. The operations of the furniture factory were not successful, and the burning of the plant in 1908 put an end to the enterprise.

In February, 1908, the furniture company was placed in the hands of a receiver, and subsequently all of its property, real and personal, were sold to pay debts, including amounts due on the first and second mortgages, which antedated the contract under which the defendant claims the spur track and right of way. A. Currie purchased all the real estate, including the tract in question, known as lot 5, without any reservation. A. Currie sold to Drake and Buchanan all of lot 5 except 1.5 acres, and the said purchasers sold to the plaintiff company. From this statement it would seem that the judicial sale to pay the anterior mortgages ousted whatever title the defendant may have had to the right of way in question.

The contract of May 1, 1905, relative to said spur track, recites that it was to be constructed and operated "for the purpose of receiving lumber, furniture, and other material entering into the manufacture of furniture and shipping of furniture from

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said factory;" that the furniture company was to do all the necessary grading required for said spur track, and also to furnish free of cost all the land necessary for the right of way outside of the right of way or land of the railway company, the furniture company assuming and agreeing to pay all damages to adjacent property by reason of the construction and operation of said track; that the said furniture company convey to said railway company a right of way 25 feet wide for a single track across its property, and, in the event the railway company should remove its track therefrom, said right of way should revert to said grantor; that said track, when completed, should be used by the furniture company for the purpose of loading and shipping timber, furniture, etc., with the reservation that the railway company should have the right to use said track for its own business, or for the business of any other persons or shippers; that the said grantor should not convey or assign to any other party the right to use said track without the consent of the railway company; that the furniture company released the said railway company from any and all liability for property destroyed by fire communicated by its locomotive while operating on said track, and agreed to save harmless said railroad company from any and all damages or claims for damages resulting therefrom; that, in the event the mill or other buildings or property of the furniture company be destroyed or injured by fire, it was to pay all damages caused by such fire to the property of the railroad company, or any other cars that may be injured or destroyed; that said agreement was entered into upon the representations of the furniture company that certain specific shipments of freight will be continually made from said spur or side track, on the line of the said railroad, to wit, all inbound or outbound shipments to said mill shall be routed over the line of said railroad, where its rates are as low as any other transportation line; and that, in the event of the failure of the furniture company to make such shipments as represented, then the railroad company should have the right to cancel the contract and remove its tracks.

At the date of said contract the furniture company owned several contiguous tracts of land, aggregating about 40 acres, situated on the hills abutting the bed of Silver Lake, then and now used almost exclusively for railroad purposes. The defendant had a number of tracks in Silver Lake, and the intent was to build a spur from one of these tracks to the plant of the furniture company.

The spur track was constructed pursuant to the contract between the parties, at a total cost of \$3,592.94, of which \$2,084.05 was paid by the furniture company for grading. The balance represented the cost of rails, ties, labor, etc., expended by the railway company. The grade of this spur track was very steep,

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averaging $3\frac{1}{2}$ per cent. Up such a grade it is not practicable for a locomotive to pull more than a few cars. The furniture company was the only industry in that vicinity. Its plant was destroyed by fire in 1908. During the year 1909 the defendant used the spur for hauling old lumber from the factory site, for which service \$10 was paid. Defendant also claims that it has used the spur for hauling dirt and storing cars. As the plaintiff owns the land through which the spur runs, it is evident that it can be no longer used for the purpose of hauling dirt from the premises. The evidence shows that little or no use was made of the spur for storage purposes until it was made evident that the plaintiff had purchased lot No. 5 for terminal purposes.

The contract, read in the light of the surrounding circumstances, shows that the spur was not intended for public use, but for the benefit of the furniture company and the railroad. The provisions of the contract relating to the use of the spur by the railroad in its own business cannot be dis severed from the main purpose of the agreement; that is to say, the transportation of material, furniture, etc., to and from said factory. This purpose precludes the use of the spur as a storage track, and it may be noted that the spur was not used for any purpose while the factory was in existence. The destruction of the factory by fire and the forced sale of the land on which it stood rendered impossible the further execution of the agreement. The contention of the defendant that by the terms of said contract it acquired an unconditional and perpetual right of way over the tract of land in question for any and all purposes is clearly untenable. The spur track was constructed at the expense of both parties; the furniture company paying the greater portion of the cost, besides furnishing the land for the right of way, and assuming or waiving all liability for damages.

A contract of this kind, for the joint benefit of the contracting parties, cannot be considered in any other light than a private enterprise. As the spur was on the lands of the grantor and terminated at its factory, we cannot see how it could have been used by the public, which had no rights of ingress and egress over the premises.

"And the weight of authority, as well as the better reason, seems to be to the effect that lines of railroads, branches, or spurs to mines, manufacturing establishments, and the like are a public use for which land may be condemned, where the general public have the right thereon to be served without discrimination." Elliott on Railroads (2d Ed.) vol. 2, § 961.

If the defendant's right of way is not in public use, it may be expropriated like any other private property. *Railway Co. v. Railroad Co.*, 49 La. Ann. 34, 21 South. 144; *Railroad Co. v. Railroad Co.*, 51 La. Ann. 1605, 26 South. 278.

"Property of a corporation, not devoted to a public use, is

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subject to the exercise of the right of eminent domain, the same as that of individuals." 15 Cyc. 612.

The defendant's objection to the necessity of the particular expropriation are met by the reasoning of the court on a similar state of facts in *Railway Co. v. Railroad Co.*, 49 La. Ann. 29, 21 South. 144.

The plaintiff, as owner of the tract of land on which the spur track in question is located, cannot as a business proposition build its tracks over or under the spur track in question, which blocks the way to its terminus on Marshall street. Whatever interest the defendant may have in said spur track is of a private character, and must yield to the public enterprise undertaken by the plaintiff company.

Defendant's interest in the spur track consists of its ownership of the rails, ties, etc., constituting the superstructure of the roadbed. Defendant has no just claim to the roadbed, which was constructed at the cost of the furniture company. A fortuitous event having prevented the performance of the obligations of the contract on the part of the furniture company, the right of the defendant is restricted to a rescission of the agreement. Under the very terms of the contract it was stipulated that, in the event of the failure of the furniture company to make shipments as agreed, the railroad company should have the right to cancel the contract and remove its tracks.

Under our views of the rights of the defendant in and to the right of way in question, the allowance of damages cannot be considered as excessive; and, on the other hand, the award cannot be disturbed, in the absence of prayer to that effect on the part of the appellee.

It is therefore ordered that the judgment be affirmed, and that defendant and appellant pay all costs of appeal.

CINCINNATI, N. O. & T. P. RY. CO. *v.* SADIEVILLE MILLING CO.

(Court of Appeals of Kentucky, March 15, 1910.)

[126 S. W. Rep. 118.]

Railroads—Fires—Evidence.—In an action against a railroad company for the destruction of plaintiff's barn by fire, where there was no evidence of the presence of fresh cinders near the barn at the time of the fire, it was error to admit evidence that on several occasions defendant's trains had stopped there and cleaned the fire boxes of the engines, and that the cinders rolled down the fill near the track toward plaintiff's barn.

Railroads—Liability for Fires.*—A railroad company is not liable for damages done by sparks from its engines, where the latter are equipped with the most effective spark arresters in general use, unless there is negligence in the management of the engines.

Railroads—Fires—Action for Damages—Evidence.†—Where the railroad company showed that the spark arrester on the engine, which it is claimed caused the fire in question, complied with the statute as to spark arresters, it was proper for plaintiff to rebut this evidence by showing that, shortly before and after the fire, other engines, equipped with spark arresters of the same pattern, emitted large sparks and frequently set fires.

Railroads—Fires—Sufficiency of Evidence.—The mere fact that engines passing shortly before and after the fire emitted sparks is not sufficient to make a prima facie case of negligence, in the absence of direct testimony or circumstances showing that the engines which passed before the fire emitted sparks, or were otherwise negligently managed.

Railroads—Fires—Negligence—Question for Court or Jury.—Evidence as to the cause of the fire causing the damage sued for held to require a peremptory instruction for defendant railroad company.

Appeal from Circuit Court, Scott County.
"To be officially reported."

Action by the Sadieville Milling Company against the Cincinnati, New Orleans & Texas Pacific Railway Company. Plaintiff had judgment, and defendant appeals. Reversed.

Bradley & Bradley and John Galvin, for appellant.
B. M. Lee, for appellee.

*See foot-note of *Gracy v. Atlantic C. L. R. Co.* (Fla.), 26 R. R. R. 508, 49 Am. & Eng. R. Cas., N. S., 508.

†See first foot-note of *Osburn v. Oregon R. & N. Co.* (Idaho), 31 R. R. R. 456, 54 Am. & Eng. R. Cas., N. S., 456; last foot-note of *Ides v. Boston & M. R. R.* (Vt.), 33 R. R. R. 282, 56 Am. & Eng. R. Cas., N. S., 282.

Cincinnati, etc., Ry. Co. v. Sadieville Milling Co

CLAY, C. Charging that appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, had negligently burned its barn and certain personal property therein contained, appellee, Sadieville Milling Company, brought this action to recover damages. The jury awarded appellee the sum of \$337. From the judgment based thereon, this appeal is prosecuted.

It is earnestly insisted by counsel for appellant that the trial court erred in refusing to award it a peremptory instruction. In view of the conclusion of this court, it will be necessary to determine only the propriety of the trial court's ruling in that particular.

The facts are as follows: Appellee's mill and grounds adjoin appellant's right of way. The tracks of the railway run north and south, and are located on the top of a fill. There are two tracks: The main track about 22 feet from the edge of the fill above the barn, and the passing track about 11 feet. At the foot of the fill there is a stone wall. From the edge of the fill to the top of the stone wall the distance is about 50 feet. The stable which was burned is about 20 feet from the wall. The space between the wall and the stable is occupied by a road. The railway tracks are about 30 feet higher than the ground on which the stable stands. The ridge of the roof of the stable runs parallel with the tracks. The stable was constructed of oak lumber; it had a tin roof, a portion of which had been blown off at the time of the fire. The loft of the stable was filled with hay. There was testimony to the effect that the barn where the roof had been blown off was burning when the fire was discovered. There was also testimony to the effect that the barn was not burning at this point when the fire was first discovered by another witness, but was burning in the north end; that is, on the side opposite from the railway. The fire was discovered about 4 o'clock in the morning. The only trains that passed that night near the time of the fire were a south-bound freight which went by at 3 o'clock and did not stop; a train which came in at 1:19, stopped, and left at 2:18; one which came in at 1:50, stopped, and left at 2:13, and one which went through at 1:23, and did not stop. As to the cause of the fire, the evidence for appellee is to the effect that both before and after the fire, engines were seen passing by and emitting sparks varying in size from that of a pea to that of a man's thumb. Furthermore, that upon more than one occasion appellant's trains had stopped at that point and cleaned out the fire boxes of the engines. When this was done, cinders would roll down the fill towards appellee's barn. It was also shown that the ground around the stable was free from grass or rubbish. The evidence for appellant is to the effect that engine No. 684, which was hauling the train that passed at 3 o'clock, and which was the only engine passing within an hour and three-quarters of the time of the fire, was equipped with a standard spark ar-

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rester, and that this spark arrester was in good condition. The engine was regularly handled.

We think the court erred in admitting evidence of the fact that on more than one occasion engines had stopped at a point near the barn, and had had their fire boxes cleaned out, and that the cinders therefrom would roll down the fill. Even if such a custom on the part of the railroad company could be shown, the evidence failed to disclose such uniformity in the custom as to make it admissible for the purpose for which it was intended. No one testified to the presence of any fresh cinders at the time of the fire, either upon the tracks or at the bottom of the fill. In the absence of such testimony we fail to see how the fact that on several occasions trains had stopped there, and the fire boxes of the engines had been cleaned out, and cinders rolled down the fill, would be competent to show that on the occasion in question the fire originated from that cause. As this evidence was inadmissible, the question, then, arises: Was the evidence that other engines before and after the fire emitted large sparks, considered in connection with the location of the barn, sufficient to justify the submission of the case to the jury? This court has never held that evidence that other engines threw out large sparks of fire was sufficient of itself to justify the submission of a case to the jury. Under the statute a railroad company is not liable for injury done by the escape of sparks from its engines, where its engines are equipped with the most effective spark arrester in general use, unless it is negligent in the management of its engines. When, therefore, the railroad company shows that the spark arrester on the engine, which it is claimed caused the particular fire, complies with the statute, it is competent for the party injured to rebut this evidence by showing that, shortly before and after the fire, other engines equipped with spark arresters of the same pattern emitted large sparks, and frequently set fire to fences and grass at other places.

Thus, in the case of Kentucky Central R. R. Co. v. Barrow, 89 Ky. 638, 20 S. W. 165, where there was evidence that sparks came from a locomotive that passed shortly before the fire, the court said: "The question before the jury was whether the fire that burned and injured appellee's property was caused by sparks that escaped from the chimney of appellant's locomotive which passed at noon of the day mentioned, for no evidence was introduced tending to show it originated otherwise; and as it was necessary to resort to circumstantial evidence to show the origin of the fire, it was competent to introduce any evidence having a direct bearing upon the question. In the absence of direct evidence as to the condition of that particular locomotive on the occasion referred to, evidence as to the usual condition of appellant's engines which are run upon that road is competent." In the case of I. & N. R. R. Co. v. Samuel's Ex'rs, 57 S. W. 235,

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22 Ky. Law Rep. 304, the court used the following language, which was afterwards approved in I. C. R. R. Co. v. Scheible, 72 S. W. 325, 24 Ky. Law Rep. 1708: "The law is well settled in this state that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam; and it is not liable for injuries resulting from the sparks escaping from its locomotive if it was furnished at the time with the best and most approved screen and spark arrester in practical use, when these appliances were in perfect order, if not otherwise guilty of negligence in the operation of its engine. But it is equally well settled that, in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or for failure to have the spark arrester in proper condition, the testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will, of itself, warrant the presumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard." These cases clearly illustrate the purpose for which such evidence is admitted. It has never been held that such evidence alone is sufficient to justify the conclusion that a fire resulted from the negligence of the railroad company. Thus, in the case of C., N. O. & T. P. Ry. Co. v. Falconer, 97 S. W. 727, 39 Ky. Law Rep. 152, it was shown that a few minutes before the fire was discovered a freight train passed Falconer Station, emitting sparks of considerable size. In the case of C. & O. R. R. Co. v. Richardson, 99 S. W. 642, 30 Ky. Law Rep. 786, there were a number of witnesses who testified that the passing train set fire to the house in question. In the case under consideration no one saw any of appellant's trains pass by on the night of the fire; no one testified as to sparks coming from them; nor was there any testimony as to how the trains were managed or operated. There was no testimony that any sparks were found in the vicinity of the fire. No large cinders were picked up near the barn. There is not even testimony to the effect that other fires had been started by appellant's engines near this point, shortly before or after the fire. To hold a railroad company responsible in this case would make it responsible in every case for every fire occurring along its right of way, just so it was shown that its engines, shortly before and after the fire, emitted large sparks. While the courts have been very liberal in authorizing the submission of this class to the jury upon the ground that fires of this kind frequently occur in the night when no one is present, and it is impossible to make out a case except from the attendant circumstances, they have never gone to the extent of holding that the mere fact that other engines, shortly before and after the fire, emitted large sparks was sufficient to make out a *prima*

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facie case of negligence, in the absence of direct testimony, or some circumstances tending to show, that the trains which passed before the fire, and whose passing would reasonably account for the fire, emitted sparks of fire or were otherwise negligently managed.

For the reasons given, we conclude that the trial court erred in refusing to award appellant a peremptory instruction on the evidence now before us. The judgment is therefore reversed, and cause remanded for a new trial consistent with this opinion.

SOUTHERN RY. CO. v. BAILEY.

(Supreme Court of Appeals of Virginia, March 10, 1910.)

[67 S. E. Rep. 365.]

Railroads—Injuries to Person at Station—Contributory Negligence.

—Where a drayman at a depot stands on a cement sidewalk so close to a railroad track that he is injured by being struck by a portion of an approaching engine, and his view was clear and unobstructed for about 1,000 feet, and the track was straight for 767 feet, and the engine was moving five or six miles an hour, the drayman is negligent.

Railroads—Injuries to Person at Depot—Care Required.

—Those controlling a railroad train approaching a depot or any other point at which it is reasonably to be expected that persons would be in danger must use reasonable care to avoid doing them an injury.

Railroads—Persons on Track—Last Clear Chance.*

—For an engineer to see a man on a railroad track is not necessarily to see that man in a position of danger, since, if in the possession of his faculties, such person may avoid the injury by using ordinary care to discover the approach of the engine.

Railroads—Persons on Track—Last Clear Chance.†

—When it becomes apparent to those controlling a train that one on the track is unconscious of his danger, or is so situated as to be incapable of self-protection, it becomes the duty of those in control of the train to do all that they can consistent with their higher duty to others to save him from the consequences of his own act.

Railroads—Injuries from Operation—Degree of Care.

—The duty of guarding an individual against injury which the law imposes on a rail-

*See last foot-note of *Norfolk, etc., Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; second head-note of *Boulden v. Louisville & N. R. Co.* (Ky.), 32 R. R. R. 99, 55 Am. & Eng. R. Cas., N. S., 99.

†See first foot-note of *Neary v. Northern Pac. Ry. Co.* (Mont.), 31 R. R. R. 758, 54 Am. & Eng. R. Cas., N. S., 758; last foot-note of *Norfolk & W. Ry. Co. v. Dean's Adm'x* (Va.), 26 R. R. R. 784, 49 Am. & Eng. R. Cas., N. S., 784.

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road company is no greater than that which the individual owes to care for his own safety.

Railroads—Persons on Track—Duty to Look Out.—It is the duty of a person on the track of a railroad to keep constant lookout for approaching trains.

Railroads—Injuries to Person at Depot—Concurring Negligence.†—A drayman at a depot stood on a cement sidewalk so near the track that he was struck by a portion of an engine coming into the depot at five or six miles an hour. He could have seen the engine 1,000 feet away. The engineer of the engine also discovered the drayman, but made no effort to stop the train. Held, that the negligence of the drayman continued up to the moment of the injury, and, though the engineer was also negligent, the doctrine of last clear chance did not apply, since at any time the drayman, apparently in possession of all his faculties, could have stepped back and escaped injury, and hence it was a case of concurring negligence for which there could be no recovery.

Error to Circuit Court, Orange County.

Action by John S. Bailey against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Williams & Tunstall and Shackelford & Shackelford, for plaintiff in error.

A. T. Browning and E. H. De Jarnett, Jr., for defendant in error.

KEITH, P. A jury found a verdict for the plaintiff upon the defendant's demurrer to the evidence, and the case is before us upon a writ of error.

Bailey, the plaintiff in the circuit court, was engaged as a drayman in carrying baggage and merchandise of various kinds from and to the station and trains of the Southern Railway, in the town of Orange. There are two tracks upon the Southern road at this point, a track upon which the trains move from the north to the south, known as the "south-bound track," and a track upon which trains move from the south to the north, known as the "north-bound track." Upon the latter track, on the occasion in question, there stood a train of the Chesapeake & Ohio Railway. Just before receiving the injury, Bailey had left his horse and wagon at the rear of the depot on the east side of the railroad tracks, had crossed the track to the west side, heard the Chesapeake & Ohio train coming north, turned and moved toward the south, stopped, and was looking at the Chesapeake & Ohio train when he was struck by an engine of

†For the authorities in this series on the subject of concurring negligence, see *Blodgett v. Central Vermont Ry. Co. (Vt.)*, 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511.

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the Southern Railway Company on the south-bound track, and received the injury for which he sues. He was standing upon a cement walk which was about on a level with the railroad track, and was struck by some part of the engine. He states that just before his attention was drawn to the Chesapeake & Ohio train he looked toward the north and saw nothing; that he does not suppose it was more than a minute after he looked before he sustained the injury and lost consciousness.

The uncontradicted evidence is that from the point at which Bailey was struck there is a clear and unobstructed view to the north for about 1,000 feet, and that for 767 feet of this distance the track is straight. The ordinance of the town of Orange prescribes six miles an hour for the speed of trains within the corporate limits, and the evidence is that on this occasion it was moving at the rate of five or six miles an hour.

Bailey knew that trains were constantly passing upon the track near which he stood. In standing so near the track as to be struck by a passing engine, he was plainly guilty of negligence—of negligence which continued up to the moment of the accident. In addition to what has been stated, let it be conceded that the employees of the railway company operating its train saw the position which Bailey occupied, or by the exercise of reasonable care on their part could have seen him, the question for our determination is whether the jury were warranted in finding a verdict for the plaintiff upon these facts, or whether they present a case of mutual and concurring negligence upon which there can be no recovery.

We have held in numerous cases that those controlling a railroad train approaching a depot or any other point at which it was reasonably to be expected that persons would be in danger must use reasonable care to avoid doing them an injury. We have held in many cases that an engineer seeing a person upon the track in the apparent possession of all his faculties would have a right to suppose that such person would get out of the way of the approaching train; in other words, that to see a man upon the track is not necessarily to see that man in a position of danger, because, if in the possession of his faculties, and in the exercise of that care which is incumbent upon him, he looks out for an approaching train, he can reach in an instant a place of safety, and the peril of one upon the track cannot therefore be known to those in control of the train until it becomes apparent that he is unconscious of his danger, or so situated as to be incapable of self-protection, when it becomes the duty of those in charge of the train to do all that they can, consistent with their higher duty to others, to save him from the consequences of his own act. We have held that the duty of guarding an individual against injury which the law imposes upon a railroad company is no higher or greater than that which

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the individual owes to care for his own safety; that all men know that to be upon a railroad track along which trains are frequently moving is to be in a position of danger, and imposes upon the person so exposing himself the obligation to keep a constant lookout for his own protection.

These principles apply with equal, perhaps greater, force to one who takes a position near a railroad track and in such close proximity as to be struck by any of the projecting parts of an engine or train—indeed, a person standing near a track would not so readily excite the apprehension of the engineer that his train might do him mischief as if the person stood or moved upon the track and within the rails, and he could also more easily remove himself from his position of peril.

Bailey was standing so near the track that some part of the engine of the south-bound train of the Southern Railway Company struck him and inflicted the injury. He was looking toward the Chesapeake & Ohio train, from which passengers were alighting. There was a good deal of bustle and stir around him. The engine in emitting steam added to the noise and confusion; and he relied upon these and perhaps some other like causes to excuse his admitted want of attention, for he expressly says, in answer to the question, "Was there anything to prevent you walking far enough on the sidewalk to be in a place of safety? A. I don't know whether I was or not. I didn't have just the presence of mind. I wasn't thinking when I stopped there. I didn't know that there was anything coming back behind me. I could have walked further out, but I just happened to be walking along there and stopped. My attention drew to the other train, and I happened to stop at that place. I wanted to see if there was any baggage or something of that sort. Consequently I did not get there. I stopped for a minute, and that is all that I remember." There can be no doubt, therefore, that Bailey was guilty of negligence which continued up to the very moment when he was struck by the train.

In the case of *Southern Ry. Co. v. Bruce*, 97 Va. 92, 33 S. E. 548, this court said: "It is the duty of a railroad company to use reasonable care to avoid injury to a licensee on its track, but it is equally the duty of the licensee to take ordinary precautions for his own safety, even if there be negligence on the part of the company, and if, through his failure to do so, he is injured, he cannot recover. The question is not whether the plaintiff's negligence caused, but whether it contributed to, the injury, and, if it did so, there can be no recovery therefor. In the case at bar the negligence of the plaintiff's intestate contributed to his injury, and there can be no recovery therefor. He walked on the track when there was another safe, suitable, and convenient walkway. He apparently neither looked nor listened for approaching trains, and failed to get off the track, though others near him did so."

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In *Norfolk & Western Ry. Co. v. Cromer's Adm'x*, 99 Va. 763, 40 S. E. 54, it is said that "It is not necessary to the defense of contributory negligence to show that but for it the accident would not have occurred. It is enough to show that the negligence of the plaintiff contributed to the injury. The question to be determined is not whether the plaintiff's negligence caused, but whether it contributed to the injury of which he complains."

In *Norfolk & Western Ry. Co. v. Wilson*, 90 Va. 263, 18 S. E. 35, it was held that one crossing a railroad at a place where the public is licensed to cross, who, knowing that he is on one of the main tracks over which trains pass at all hours, fixes his attention upon a train on the other track which he has changed his course to avoid, and takes no precautions in looking out for trains upon the track on which he is walking, is guilty of such negligence as defeats his recovery for injuries from being struck by such train.

In *Chesapeake & Ohio Ry. Co. v. Rogers*, 100 Va. 324, 41 S. E. 732, it was held to be the duty of a person walking on a railroad track to listen and keep a constant lookout for approaching trains in order to avoid danger to himself, and that the necessity for doing so is not relieved by the negligence, if any, of the railroad company or its servants.

In *Richmond Passenger & Power Co. v. Steger*, 101 Va. 319, 43 S. E. 612, it was held that: "There being evidence tending to show that a plaintiff, after going upon a street railway track, did not use ordinary care in getting off before he was struck by an approaching car, which was very near and which he had signaled to stop, it was error to instruct the jury to find in his favor, if they believed from the evidence that at the time he got on the track the motorman of the car saw, or could by the exercise of ordinary care have seen, him in time to stop the car so as to avoid striking him, and failed, in the exercise of such care, to do so." The court said: "There is evidence tending to show that the plaintiff, after he went upon the track, paid no further attention to the approaching car. If he had done so, the defendant's counsel insists he would have seen that the car was not checking its speed nor going to stop, as he had motioned it to do, and when he saw this he might, by his own movements, have gotten out of the way of the car, and saved himself from injury."

"If the continuing negligence of a plaintiff up to the time of the injury concurs with the negligence of the defendant in causing the injury, the plaintiff cannot recover." *Consumers' Brewing Co. v. Doyle*, 102 Va. 399, 46 S. E. 390.

In *Southern Ry. Co. v. Forgey*, 105 Va. 599, 54 S. E. 477, the same principle is enforced; the court saying: "Where an injury or loss is caused by the concurrent negligence of both

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the plaintiff and the defendant, contributing as an efficient cause to the injury complained of, there cannot as a general rule be any recovery, as the court will not undertake to balance the negligence of the respective parties in order to ascertain which one was most at fault."

To the same effect, see *Humphreys v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882: "If the proximate cause of a plaintiff's injury is his own negligence, concurring with the negligence of the defendant, there can be no recovery." *Richmond Pass. & Power Co. v. Gordon*, 102 Va. 498, 46 S. E. 772.

In 7 L. R. A. (N. S.), p. 132, there is an instructive note upon the case of *Dyerson v. Union Pacific R. Co.* In that case it was held that a plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort. As is said in the note: "The point upon which the decision in the principal case turns is that the negligence of the plaintiff continued up to the very moment he was hurt, and was therefore contemporaneous and concurrent with the negligence of the defendant."

The author of the note referred to shows that courts in applying the doctrine of the last clear chance have sometimes supported a recovery, although, upon the facts, the plaintiff or the deceased, and not the defendant, would seem, but for his own negligence, to have had the last clear opportunity to avoid the injury. The duty on the part of the defendant's employees to keep a lookout is conceded, but it is shown that there is a corresponding duty upon the part of the deceased to keep a lookout for trains, and, if his breach of duty in that respect continues up to the moment of the injury, he cannot recover, for such a case is not one of prior negligence on the part of the deceased and subsequent negligence on the part of the defendant, but of concurring negligence on the part of both up to the very instant of the accident.

We leave out of view, of course, cases where the plaintiff is apparently not in the possession of his faculties, as in the case of *Seaboard R. Co. v. Joyner's Adm'r*, 92 Va. 354, 23 S. E. 773, or where, as sometimes happens, the injured person is caught upon a trestle or a bridge, or is otherwise placed in a helpless condition, and those in control of the train had actual knowledge of his condition, or by the exercise of reasonable care should have known of his peril.

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We concede the liability of the defendant, also, where the circumstances show that, if the defendant had exercised reasonable care to discover the plaintiff's peril, it could have averted the accident, when it was too late for the plaintiff by the performance of his duty to have extricated himself.

This principle is thus stated in *French v. Grand Trunk R. Co.*, 76 Vt. 441, 58 Atl. 722: "It is true that when a traveler has reached a point where he cannot help himself, cannot extricate himself, and vigilance on his part cannot avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that if a traveler when he reaches the point of collision is in a situation to help himself, and by vigilant use of his eyes, ears, and physical strength to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent and operative at the time of the accident. When negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery."

In *Robards v. Indianapolis Street R. Co.*, 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953, the doctrine of the last clear chance is thus stated: "The plaintiff must show that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be the proximate cause of the injury. * * * The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous."

In *Green v. Los Angeles Ter. R. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, the doctrine of the last clear chance was held to apply, notwithstanding the contributory negligence of the plaintiff; the court saying: "It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury. It has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it."

And in *O'Brien v. McGlinchy*, 68 Me. 552, the court says, speaking of the doctrine of the last clear chance: "This rule applies usually in cases where the plaintiff, or his property, is in some position of danger from a threatened contact with some

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agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent an injury. * * * But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them."

In *Smith v. Norfolk & Southern R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287, the rule is thus stated: "Applying the rule which we have stated to accidents upon railroad tracks, it may be illustrated as follows: First, there must be a duty imposed upon the engineer, as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout * * * in order to discover and avoid injury to persons who may be on the track, and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision, when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A., being on the track and after this decisive negligence, fails to look and listen, and is in consequence run over and injured, his negligence is not concurrent merely, but really subsequent, to that of the engineer, and he cannot recover, as he, and not the engineer, has the last clear opportunity of avoiding the accident. If, however, A. is on the track, * * * and while there, and before the decisive negligence of the engineer, he by his own negligence becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A. would be previous to that of the engineer, and the engineer's negligence would be the proximate cause; he, and not A., having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when no effort of the owner could remove it; and there are other cases to which the principle is applicable."

We are dealing here with a case where a plaintiff, who could, up to the moment of impact, have placed himself in a position of safety, if he had exercised ordinary care to discover the approaching train, is seeking to recover from the defendant company because, by the exercise of like care, it could have avoided inflicting the injury of which he complains; and the question is whether or not a plaintiff can recover of a defendant where they are equally guilty of the breach of an identical duty, the consequences of which continue on the part of both to the moment of the injury. Of course, before the doctrine of the last clear chance can be invoked, it must be shown that the defendant has

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been guilty of negligence, either before or after the discovery of the peril constituting the proximate cause of the accident.

In *Norfolk & Western Ry. Co. v. Dean's Adm'r*, 107 Va. 505, 59 S. E. 389, this doctrine was applied, and it was held that where the presence of a person upon the track is observed by careful and experienced men operating the train, and they, in the exercise of their best discretion, do not regard him in danger, until on getting nearer to him he appears to be unconscious of his peril, and they then do all in their power to prevent an injury to him, though without avail, the company is not liable.

The controlling principles of the cases from this court and elsewhere are well stated in the case of *Richmond Traction Co. v. Martin's Adm'r*, 102 Va. 209, 45 S. E. 886, where the court said: "Two theories were propounded by the evidence: (1) That at the time Martin attempted to cross the northern track of the defendant's railway the car in question was at a standstill, and was subsequently set in motion, and the collision occurred; and (2) that while the car was already in motion Martin stepped on the track immediately in front of it, and was struck by the fender." The court, having granted an instruction upon the first theory, which was that of the plaintiff, was asked by the defendant to tell the jury that, if they believed from the evidence "that the plaintiff's decedent on the evening when he met the accident that resulted in his death was intoxicated from drink, and that, being so intoxicated, he attempted to cross defendant's railway track in front of a moving car that was approaching him, so close to said car that he could not move beyond the point on the track that he first reached before the car struck him, then they are instructed that the plaintiff cannot recover in this action"—to which the court added: "Unless they believe further from the evidence that the defendant by the exercise of ordinary care could have avoided inflicting on him the injury which resulted in his death after the motorman saw, or by the exercise of ordinary care could have seen, the danger in which the plaintiff's decedent had placed himself in time to have avoided the accident." The court held that this addition to the instruction was under the circumstances of the case erroneous; that "the well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction between negligence in the plaintiff and negli-

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gence in the defendant, except that the negligence of the former is called contributory negligence.

"The general rule adverted to is subject, however, to the qualification that where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. From that principle arises the well-established exception to the general rule that if after the defendant knew, or in the exercise of ordinary care ought to have known, of the negligence of the plaintiff, it could have avoided the accident, but failed to do so, the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff.

"It was this principle that was invoked by the plaintiff upon the first theory of the case, and applied by the court in plaintiff's instruction and in the modified instruction of the defendant. But the second theory presented a case where the proximate and efficient cause of the accident involved the concurrent negligence of both plaintiff and defendant, unbroken by any efficient supervening cause, and to such case the exception referred to obviously has no application. Upon that theory, the act of Martin and the conduct of the motorman were so substantially concurrent that it was impossible to separate the conduct of the former from the injury itself. The doctrine under discussion is fundamental and elementary, and has been expounded time and again by this and other courts, from *Davis v. Mann*, 10 Mees & W. 545, decided in the year 1842, down to the present time." See, also, *C. & O. Ry. Co. v. Corbin's Adm'r*, 110 Va. —, 67 S. E. 179.

If it be the duty of a person upon the track of a railway to keep a constant lookout for approaching trains (and of this there can be no question), and if it be the duty of the servants of the company in control of the train to exercise reasonable care to discover the presence of a person upon the track, and if in the exercise of such reasonable care the presence of such person would be discovered, and the person on the track is injured, and there be no other fact proved, then it is apparent that the case stated would be one of mutual and concurring negligence, and there can be no recovery. The duty was equal and each is equally guilty of its breach. If, however, it appears that those in control of a train in the discharge of their admitted duty to keep a reasonable outlook discover, or should

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have discovered, a person upon the track, and there be super-added any fact or circumstance brought home to their knowledge sufficient to put a reasonable man upon his guard that the person upon the track pays no heed to his danger and will take no step to secure his own safety, then the situation changes, and the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be a recovery.

For these reasons, the judgment of the circuit court must be reversed, and this court will enter such judgment as that court should have entered.

Reversed.

BUCHANAN, J., absent.

PITTSBURG RYS. CO. v. CITY OF PITTSBURG.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 681.]

Railroads—Rights in Streets—Right to Cross.—That a city does not properly maintain a street for public use does not affect its right to prevent a railroad company from occupying the street.

Railroads—Rights in Streets—Right to Cross.—A railroad company to cross a city street without municipal consent must possess such charter power, though it owns the land on both sides of the street.

Railroads—Rights in Streets.—That a lessee railroad company under its charter has power to cross city streets without municipal consent would not authorize it to extend a leased road over a street without such consent where the charter of the leased road requires such consent.

Corporations—Implied Powers.—The doctrine of implied power of corporations will not be extended to permit that to be done by a corporation which the Legislature has previously said shall not be done, even if without such implied power the grant of some particular franchise would be valueless.

Appeal from Court of Common Pleas, Allegheny County.

Action by the Pittsburg Railways Company against the City of Pittsburg. From a decree awarding a preliminary injunction, defendant appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

C. A. O'Brien and C. K. Robinson, for appellant.

David A. Reed and Wm. M. Robinson, for appellee.

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BROWN, J. The Mt. Washington Street Railway Company is a corporation chartered under the general street railway acts of the commonwealth, and the Pittsburg & Castle Shannon Railroad Company was incorporated under the general railroad act of April 4, 1868 (P. L. 62): By leases dated, respectively, March 30, 1903, and August 25, 1905, the Pittsburg Railways Company became the lessee of these two companies. It was originally incorporated as the Surety Contract Company by the act of May 25, 1871 (P. L. 1170), and under its present name has accepted the provisions of the Constitution of 1874. By the act incorporating it it is empowered "to contract with any person or persons, firms, corporations or any other party, howsoever formed, existing, or that may hereafter exist, in any way that said parties, or any of them, may have authority to do, to build, construct, maintain or manage any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation and conveyance of freight, live stock, passengers and any other traffic, by land or water, from or to any part of the United States, or the territories thereof; * * * and to purchase, make, use and maintain any works or improvements connecting or intended to be connected with the works of the said company, and to merge or consolidate or unite with the said company." Under these broad terms, the Pittsburg Railways Company asserts power to construct an extension or branch from the Pittsburg & Castle Shannon Railroad to connect with the tracks of the Mt. Washington Street Railway Company. This branch is to be constructed over rights of way owned by the appellee, but Chess street, in the city of Pittsburg, will be crossed by it practically at right angles, and the single question before us on this appeal is the right of the appellee to build the branch across the said street without the city's consent.

The court below has found that Chess street is one of the highways of the city, beneath which a sewer has been constructed, and the appellee has not obtained municipal consent to build the branch across it; but, notwithstanding this, the preliminary injunction prayed for by the appellee was awarded, enjoining the city from interfering with the building of the branch over the street. In the opinion sustaining the contention of the appellee that it has power to cross the street without the city's consent, reference is made to the impassable condition of the highway at the point of the intended crossing and for some distance on either side thereof, and the conclusion of the court was that under the circumstances neither the city nor the public would now suffer any inconvenience from the crossing, and that, if in the future inconvenience should be suffered by it, power exists to enforce a remedy. When a municipality stands upon its right to resist the occupation or crossing of one

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of its streets by a railroad or street railway company, the condition of the street is not involved, for it is no concern of the invading company that the municipality may not be properly maintaining the highway for the use of the public. The court's reference to the condition of the street, apparently as one of the reasons why the injunction should not go out, is utterly inconsistent with the view properly expressed in another portion of the opinion, that this street, even in its present condition, could not be crossed without the city's consent, either by the Pittsburg & Castle Shannon Railroad Company, the Mt. Washington Street Railway Company, or the appellee as the lessee of either.

Equally immaterial is the fact commented upon in the opinion that the appellee is the abutting owner of the land on each side of the street at the point of the proposed crossing. With or without such ownership, when a railroad or street railway company attempts to cross a public street in a city without municipal consent, it must point to its power in its charter to do so, and the court below, after the irrelevant references to the condition of the street and to the appellee's alleged ownership of the adjoining lands, held that the power which it would exercise is to be found in its charter as existing by necessary implication. The learned chancellor's view as to this is thus expressed: "Power is therein expressly conferred upon the plaintiff to contract with any other party to construct any work which may tend to improve, increase, facilitate, or develop trade, travel, or the transportation of freight and passengers, and to erect, construct, maintain, or conduct in its own name and for its own benefit any such work. And the plaintiff is likewise authorized to 'make, use, and maintain any works or improvements, connected or intended to be connected with the works of the said company.' Now, both the Pittsburg & Castle Shannon Railroad and the Mt. Washington Street Railway are plainly 'works' of the plaintiff corporation, within the meaning of said act. The proposed track and sidings are, of course, intended to connect these two 'works' of the plaintiff. The power to make the connection is plainly conferred upon the plaintiff in the said act of its corporation. There is no limitation upon the discretion of the plaintiff as to where this connection shall be made. In making the connection, as intended, it is necessary to cross Chess street at the point indicated. Therefore the plaintiff has the right to cross Chess street as a necessary implication of its grant; otherwise the grant would entirely fail. If the plaintiff cannot cross Chess street with its intended construction, it cannot exercise the power with which the Legislature has clothed it. *Perry County R. R. Extension Co. v. Newport & Sherman's Valley R. R. Co.*, 150 Pa. 193, 24 Atl. 709." In thus reasoning and concluding, the court below failed

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to bear in mind that though the tracks which the appellee proposes to lay from the Pittsburg & Castle Shannon Railroad will be a "work" of its own, connecting two "works," to be regarded also as its own under the leases, the branch, with its sidings, will, after all, be but an extension and part of the Pittsburg & Castle Shannon Railroad. That company concededly could not cross Chess street without the city's consent, and how can another, now controlling and operating it, do what it could not do in the absence of express power from the Legislature to do the thing forbidden to the railroad company? The branch or extension is for the purpose of increasing the facilities of transportation now furnished by the Pittsburg & Castle Shannon Railroad Company through its lessee, and, keeping in view the fact that Chess street, if crossed, will be crossed by a part of the system of the Pittsburg & Castle Shannon Railroad, the right to so cross, in the teeth of the act of 1868, must expressly appear, for the doctrine of implied power is not to be stretched to permit that to be done by a corporation which the Legislature has previously said shall not be done, even if without such implied power the grant of some particular franchise should be valueless. With this distinction in mind, the case of *Perry County R. R. Extension Co. v. Newport & Sherman's Valley R. R. Co.*, relied upon by the court below, is not at all in point. While we there held that though the act of February 19, 1849 (P. L. 79), contains no express authority allowing one railroad company to cross the tracks of another, such power exists under that act by necessary implication, because the grant in some instances would entirely fail, we could not have so decided if the act of 1849 had forbidden such a crossing; and so of *Northern Coal & Iron Co. v. Wilkes-Barre*, 218 Pa. 269, 67 Atl. 352, in which, for reasons stated at some length in the opinion, we held that the company, under its charter, had the implied right to cross certain streets of the city of Wilkes-Barre. In view of the act of 1868, there is no implied power in the appellee to cross Chess street.

The decree of the court below is reversed and the preliminary injunction is dissolved, the costs on this appeal to abide the final decree.

ROESSING *v.* PITTSBURG RYS. CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 724.]

Malicious Prosecution—Probable Cause—Question of Court.—

Whether a probable cause exists under an admitted state of facts is a question of law for the court.

Malicious Prosecution—Probable Cause—Question for Court.—

Street railway conductor sued the railways to recover for an alleged malicious prosecution. Five men of good character watched the conductor at various times, and reported that he failed to ring up numerous fares, and the company did not bring the prosecution until advised to do so by counsel. Held, that whether there was probable cause was a question of law for the court.

Appeal from Court of Common Pleas, Allegheny County.

Action by Harry Roessing against the Pittsburg Railways Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

William A. Challener, Clarence Burleigh, and James C. Gray, for appellant.

Rody P. Marshall and Thomas M. Marshall, for appellee.

POTTER, J. Before the plaintiff in this case could succeed he was bound to show that the defendant had no probable cause for thinking that he was guilty of the offense for which it prosecuted him. He was bound to show an abuse of the privilege of prosecution, and that the defendant had acted in bad faith. In the present case the plaintiff met this burden only to the extent of proving his arrest, and that he was held by the magistrate to await the action of the grand jury, his indictment and trial, and his acquittal. Defendant admitted responsibility for the arrest and prosecution of the plaintiff, but claimed that there was probable cause for its action, and therefore it could not be held liable for damages in the present case.

The circumstances which led to the arrest and prosecution of the plaintiff were as follows: The plaintiff was a conductor in the employ of the defendant company, and was in charge of a street car. W. H. O'Brien, the employment agent of the company, testified for the defendant that operatives were employed to ride in the cars and check the reports of the conductors. The operative counts the passengers and sees whether they are all registered. His report shows whether the conductor is turning in all fares collected by him or not. The employment agent

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testified that in this case three operatives made separate reports to him of what they had observed on plaintiff's car. These three reports, made on different days and by different men, each showed a discrepancy between the fares collected and those registered by the conductor. In the first report there was a deficit of 10 fares, in the second of 21 fares, and in the third of 2 fares. The operatives employed were all known to witness to be of good reputation for truth and veracity, and also to be careful men. The witness testified that he believed their reports. After having received these reports from the operatives, witness detailed two special officers to ride on plaintiff's car from one end of the line to the other, in order to verify the previous reports received from the operatives. They did so on two successive days, and each reported a deficit of eleven fares on one day, and of fifteen upon the other. The witness showed that the reports of the operatives and the special officers were submitted to James Francis Burke, Esq., as special attorney for the company, and that on his advice the prosecution was instituted. There was, however, a failure to convict in the criminal court. In the present case the judge refused to give binding instructions for the defendant, and submitted the question of probable cause for the prosecution to the jury.

The main question raised here by the assignments of error is whether or not under the uncontradicted evidence probable cause for the action by the defendant was so clearly shown that the trial judge should have taken the case from the jury, and directed a verdict for the defendant. There was no dispute as to the facts which induced the prosecution, and therefore the responsibility for deciding whether these facts constituted probable cause was upon the court, and should not have been shifted to the jury. The rule is well settled. Thus in the late case of *Robitzek v. Daum*, 220 Pa. 61, 69 Atl. 96, it is said: "What is probable cause, and whether it exists under an admitted or clearly established state of facts, is a question of law for the court." And in *Fisher v. Forrester*, 33 Pa. 501, Justice Woodward said (page 508) that the case stated was "a case in which the court ought to have taken the question of probable cause away from the jury, and ruled that under the evidence, if believed by the jury, the defendant had probable cause." In *Bernar v. Dunlap*, 94 Pa. 329, it was held that plaintiff's own evidence showed the existence of probable cause, and that a nonsuit was properly entered. In *McCarthy v. De Armit*, 99 Pa. 63, Justice Trunkey said (page 69): "What facts and circumstances amount to probable cause is a question of law. Whether they exist in any particular case is a question of fact. Where the facts are in controversy, the subject must be submitted to the jury, in which event it is the duty of the court to instruct them what facts will constitute probable cause, and sub-

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mit to them only the question of such facts. This principle is well settled. If all the evidence is insufficient to establish probable cause, the court shall so instruct the jury, for they are not at liberty to find a fact without evidence; and, if the admitted facts amount to probable cause, the court shall direct a verdict for the defendant, even if his malice were clearly proved." In *Cooper v. Hart*, 147 Pa. 594, 23 Atl. 833, and in *Mahaffey v. Byers*, 151 Pa. 92, 25 Atl. 93, judgments on verdicts for the plaintiff were reversed without venire, on the ground that the uncontradicted evidence established probable cause. And in *Huckestein v. Insurance Co.*, 205 Pa. 27, 31, 54 Atl. 461, 463, it was said: "The instruction, therefore, that the prosecution was without probable cause was clearly right, and it was the duty of the court to give it. The question of probable cause is one of law for the courts, where the facts relied on to constitute it are admitted or established beyond controversy." In the case of *Bryant v. Kuntz*, 25 Pa. Super. Ct. 102, judgment on a verdict for the plaintiff was reversed without a venire. Orlady, J., there said (page 106): "The inquiry as to the probable cause goes back to the commencement of the prosecution, and it relates to the facts then known and as they then appeared. It is not confined to the truth of the matters that led to the prosecution, but extends to their appearance as indicating the guilt or innocence of the accused. If probable cause is shown it matters not whether the motive of the prosecutor be praiseworthy or malicious; and the undisputed evidence in this case made it the duty of the court below to affirm the defendant's seventh point and to direct a verdict for the defendant."

Under these established principles, it was clearly the duty of the trial judge to declare the law upon the admitted facts in this case. The uncontradicted evidence offered by the defendant in part documentary shows that O'Brien, the agent, who instigated the prosecution, placed three different "operatives" upon plaintiff's car, on different days, for the purpose of learning whether he was accounting for all the fares collected. The evidence further shows that they were men of good character, and that O'Brien believed their reports. Each operative made a written detailed report, and each report showed that plaintiff had not registered all the fares collected during the period of observation. But O'Brien took further precautions before acting. He sent two special officers on two different days, to ride with plaintiff from one end of the line to the other, to keep account of the fares collected and registered. These officers made written reports which were in evidence, and they agreed that, on both the trips which they took on plaintiff's car, he collected fares which he did not register. Even then O'Brien did not act until advised by counsel for the company that he would be justified under the evidence in having a warrant sworn out for

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plaintiff's arrest. It is difficult to conceive of circumstances which would constitute more reasonable grounds of suspicion, or would be more likely to lead a reasonable and prudent man to believe in the guilt of the plaintiff. In fact, it is hard to understand how any reasonable man could avoid the conclusion that the circumstances shown were strong indications of the guilt of the accused person.

If such circumstances as those here detailed were not sufficient to justify the defendant in invoking the protection of the law through the criminal courts, then the hope of any such protection is a vain thing. The trial judge erred in not pronouncing upon the facts. He should have given binding instructions for the defendant upon the ground that probable cause for the prosecution was clearly shown by the uncontradicted evidence in the case.

The judgment is reversed, and is here entered for the defendant.

SONTUM *et ux.* v. MAHONING & S. RY. & LIGHT CO

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 189.]

Limitation of Actions—Parties—Amendment after Expiration of Period of Limitation.—Where a father sues to recover for the death of his son, and it appears that the son died within a few hours after the accident and was unmarried, the record may be amended, after one year from the death of the son, by adding the name of his mother as a party plaintiff.

Street Railroads—Accident to Traveler—Contributory Negligence.*—Failure to look before driving upon the tracks of a street railway is negligence per se.

Street Railroads—Injury to Person on Track—Evidence—Presumptions.†—Where the evidence that a person killed in crossing the track of a street railway failed to look for an approaching car as he reached the edge of the track is convincing, contributory negligence is established as a matter of law, but where there is no positive evidence on

*See fourth foot-note of *Denis v. Lewiston, etc., Ry. Co. (Me.)*, 31 R. R. R. 516, 54 Am. & Eng. R. Cas., N. S., 516; second foot-note of *Carrahan v. Boston & N. St. Ry. Co. (Mass.)*, 30 R. R. R. 750, 53 Am. & Eng. R. Cas., N. S., 750; first foot-note of *Riedel v. Wheeling Traction Co. (W. Va.)*, 29 R. R. R. 768, 52 Am. & Eng. R. Cas., N. S., 768; second foot-note of *Pilmer v. Boise Traction Co. (Idaho)*, 29 R. R. R. 371, 52 Am. & Eng. R. Cas., N. S., 371.

†See last foot-note of *White v. New York, etc., R. Co. (Mass.)*, 31 R. R. R. 488, 54 Am. & Eng. R. Cas., N. S., 488; fourth foot-note of *McDuffee's Adm'x v. Boston & M. R. R. (Vt.)*, 29 R. R. R. 467, 52 Am. & Eng. R. Cas., N. S., 467.

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this fact, the presumption is that decedent did his duty as he approached the track.

Appeal from Court of Common Pleas, Lawrence County.

Action by Hugo Sontum and Anna M. Sontum, his wife, against the Mahoning & Shenango Railway & Light Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

C. H. Akens, for appellant.

J. Clyde Giffillan and *Robert K. Aiken*, for appellees.

ELKIN, J. This suit was brought within the statutory period by the father, while the name of the mother was added by amendment more than a year after the expiration of the time in which the action must be instituted under the statutes. The first assignment challenges the correctness of the ruling of the court in permitting the amendment. The right to add the name of a husband, or of a wife, by way of amendment after the expiration of the statutory period, if either one had properly brought suit within the time limited, is no longer an open question. It has been squarely ruled in several recent cases. *Waltz v. R. R. Co.*, 216 Pa. 165, 65 Atl. 401; *Holmes v. R. R. Co.*, 220 Pa. 189, 69 Atl. 597, 123 Am. St. Rep. 685; *Bracken v. R. R. Co.*, 222 Pa. 410, 71 Atl. 926. This is conceded by the learned counsel for appellant, but it is argued with great subtleness that the rule of these cases cannot be invoked under the facts of the case at bar. It is contended that the parents had no right of action unless it appears that the death of the son was occasioned by unlawful violence or negligence; that no suit had been brought by him in his lifetime; that the deceased did not leave a widow or children to survive him; that suit was brought by the parents within one year from the death of the son; and that no liability attached to the defendant company until action was brought in such manner and upon such conditions as the statutes require. In other words, that it is the duty of the pleader to set out all of these things in affirmative averments as the foundation of the suit, and to establish them by positive testimony at the trial. We are not familiar with any case that has stated the rule so broadly. The record shows that the suit was brought within a year, and the declaration charges negligence. The son was unmarried, and had no wife or children; and, his death having resulted within a few hours after the accident, suit could not have been brought by him in his lifetime. All of these things sufficiently appear by the record, and it would be sticking in the bark to hold that more is required. We are of opinion, therefore, that in the institution of the suit and the joinder of

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the parents no error was committed, and that the requirements of the statutes in these respects were complied with. As to the adequacy of the charge and the instructions to the jury about which complaint is made in the second, third, fourth, fifth, and sixth assignments, we are not convinced that any substantial and reversible error was committed. Indeed, the charge shows careful and thoughtful consideration of the questions raised and the law applicable to the facts. The objections made as to the definition of negligence and the measure of damages are too refined to be substantial in the practical administration of the law. The seventh assignment is the only one about which we have any doubt. The error alleged is that the court upon request did not give binding instructions for the defendant on the ground that the deceased son failed to look immediately before driving upon the tracks. This is an imperative rule, and failure to observe it is negligence per se. If it clearly appeared from the testimony that the decedent had failed to look for an approaching car as he reached the edge of the track, it would be our duty to sustain this assignment and enter judgment for defendant. There is no positive testimony upon this very material fact; and, while there is some evidence from which a strong inference might be drawn that the driver did not look, it was not so clear as to warrant the court in saying as a matter of law that he had failed in the performance of this imperative duty. The presumption in the absence of evidence is that the driver did his duty as he approached the tracks, and we have concluded, after very careful consideration of all the testimony relating to this material fact, that the case is not so clear as to warrant the court in taking it from the jury. In other words, the presumption upon which the appellants had a right to rely was not sufficiently rebutted to make it a question of law for the court, and not of fact for the jury.

Under these circumstances the case was for the jury, and we find no reversible error in the submission.

Judgment affirmed.

WIGGIN *v.* BOSTON & M. R. R.

(Supreme Court of New Hampshire, Merrimack, Jan. 4, 1910.)

[75 Atl. Rep. 103.]

Railroads—Collisions—Contributory Negligence—Evidence.—In an action for the death of a traveler, struck by a train at a crossing, evidence held to justify a finding that decedent saw the flagman at the crossing and relied on his invitation to cross.

Railroads—Collisions at Crossings—Contributory Negligence.—Where a traveler at a crossing knew that a train was coming, but his view of it was obstructed, and the position of the flagman indicated that the train was not dangerously near, he might reasonably rely on the conduct of the flagman and attempt to pass over the crossing.

Action by Edward F. Wiggin, administrator of Carrie E. Wiggin, against the Boston & Maine Railroad for the death of decedent caused by a collision with a train at a crossing. There was a verdict for plaintiff, and the cause was transferred on defendant's exceptions to a denial of the motion for a nonsuit and to other rulings made during the trial. Overruled.

Martin & Howe (Mr. Howe, orally), for plaintiff.

Mitchell, Foster & Lake and *Stephen S. Jewett* (Mr. Mitchell, orally), for defendant.

PEASLEE, J. The question between the parties to this litigation is merely of the extent to which the evidence went in showing what the decedent thought and did. She was killed in a collision with a train at a level crossing. There was a flagman, but his position was such as to be an invitation to cross. The deceased nearly ran upon him as he stood on the crossing; and from this it is argued that she did not see him, and could not have relied upon the invitation. But there is also evidence that her view of him was unobstructed, that she was looking straight ahead, and that it was her habit to look for and rely upon the flagman. From this evidence it could be found that when she looked she saw, and what she saw she acted upon. The fact that she did not turn out of the traveled path to avoid running upon the flagman is not conclusive evidence that she did not see him. He stepped aside in season to avoid being struck, and it may well have been that she thought he would do so.

If it is conceded that she heard the approach of the train, the fact is not necessarily fatal to the plaintiff's case. She then knew that a train was coming; but as her view of it was obstructed, and the flagman's position told her the train was not dangerously near, she might reasonably rely upon the conduct

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of the man whose duty it was to regulate the passage of highway travelers over the crossing.

The other exceptions have not been argued and are apparently abandoned.

Exceptions overruled. All concurred.

SPRAGUE v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana, Feb. 21, 1910.)

[107 Pac. Rep. 412.]

Negligence—Contributory Negligence—Pleading.—A complaint for negligent injury, which shows that an act of plaintiff was the proximate cause of the injury, must set forth the facts showing his freedom from negligence.

Railroads—Crossings—Relative Rights of Travelers and Trains—Contributory Negligence.—A traveler on a highway crossing a track has an equal right with the railroad to use the crossing, and an inference of negligence on his part does not arise from the mere fact that he attempted to use it at a time a train ran into him.

Railroads—Collisions—Pleadings—Contributory Negligence.—A complaint, in an action against a railroad company for the killing of horses struck by a train at a crossing, which alleges a failure to give signals of the approach of the train, by reason whereof the drivers were unaware of its approach; that in consequence thereof the train struck the horses; that from the point of crossing for a distance of a quarter of a mile there were trees along the track, and about 10 feet distant therefrom, obstructing the view of the track to a traveler passing along the highway—is good as against the objection that it contains allegations from which the driver's negligence is inferable; for, though the complaint shows that when the driver reached a point 10 feet from the track he could see the approaching train, he was not then, as a matter of law, in a place of safety, but the question is for the jury.

Railroads—Operation of Trains—Signals—Negligence.*—The failure of a railroad to sound the whistle at a point between 50 and 80 rods from a highway crossing, and to ring the bell from the point where the whistle was sounded, and until the crossing was reached, as required by Rev. Codes, § 4289, is actionable negligence.

Railroads—Highway Crossings—Obligation of Travelers.†—The fail-

*See first foot-note of *Dyson v. Southern Ry. Co.* (S. Car.), 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486; last foot-note of *Holland v. Northern Pac. Ry. Co.* (Wash.), 33 R. R. R. 264, 56 Am. & Eng. R. Cas., N. S., 264.

†See last paragraph of first foot-note of *Chesapeake & O. Ry. Co. v. Hall's Adm'r* (Va.), 32 R. R. R. 638, 55 Am. & Eng. R. Cas., N. S., 638.

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ure of a railroad to give the signals prescribed by Rev. Codes, § 4289, enacted for the protection of travelers on highways, does not excuse the traveler from the exercise of ordinary diligence, and one on approaching a railroad crossing cannot rely on the giving of such signals, but must look or listen, and stop, if necessary; and, where he fails to do so, he is guilty of negligence, precluding a recovery for injuries sustained in a collision with a train.

Railroads—Highway Crossings—Obligation of Travelers.—The duty of a traveler to look and listen on approaching a railroad crossing requires the traveler to exercise care to select a position from which an effective observation can be made, and the mere fact of looking and listening is not always a performance of the duty.

Railroads—Collisions on Highway Crossings—Contributory Negligence—Question for Jury.—Whether a driver approaching a railroad crossing exercised ordinary care in selecting a point to stop and listen for approaching trains, and whether in doing what he did, from that point until a collision with a train at the crossing, amounted to the exercise of ordinary care, held under the evidence for the jury.

Appeal from District Court, Gallatin County; W. R. C. Stewart, Judge.

Action by Walter Sprague against the Northern Pacific Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

The complaint in this action alleges that on June 23, 1907, Lester Nelson and Charles Chappel, the agents and employees of the plaintiff, were driving from Chestnut to Bozeman in a buggy, and leading two horses belonging to the plaintiff; that at a point near Gordon Siding the public road crosses the track of the railway company; that from this point of crossing, for a distance of a quarter of a mile in an easterly direction, there were trees and brush along the railway track, and about 10 feet distant therefrom, and of such height as to obstruct the view of the track to a traveler passing along the public road. It is then alleged that, as Nelson and Chappel "reached said crossing, the defendant carelessly and negligently caused one of its locomotives, with a train of cars attached thereto, being west-bound train No. 3 operated by said defendant, to approach said crossing, and then and there to pass rapidly over the track of the said railroad at said point, and negligently and carelessly omitted its duty, while approaching the said crossing, to give any signal by ringing the bell or sounding the steam whistle, within a distance of 80 rods from said crossing, or at all, by reason whereof the said Lester Nelson and the said Charles Chappel were unaware of the approach of the said train; that in consequence thereof the locomotive struck and instantly killed

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the said two horses belonging to plaintiff, which were being led by said Lester Nelson and Charles Chappel, to the damage of plaintiff in the sum of \$600." The complaint contains a second cause of action, couched in similar terms, for damages to the buggy and injury to one of the driving horses. It is alleged that the buggy and driving team belonged to W. J. Fransham, and that he assigned his claim for damages to the plaintiff before this action was commenced. The answer admits the injuries, but denies negligence on the part of the railway company, and pleads contributory negligence on the part of the plaintiff. The allegations of this special plea were put in issue by the reply. At the conclusion of plaintiff's evidence in chief the defendant moved the court for a directed verdict, but the motion was overruled. Defendant then declined to offer any evidence, the cause was submitted to the jury, a verdict returned in favor of the plaintiff, and from the judgment entered upon the verdict, and from an order denying it a new trial, the railway company appealed.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant.

H. A. Bollinger and George Y. Patten, for respondent.

HOLLOWAY, J. (after stating the facts as above). It is urged that the complaint does not state facts sufficient to constitute a cause of action, and that the evidence is not sufficient to sustain the verdict.

1. The attack upon the complaint proceeds upon the theory that the pleading contains allegations from which the plaintiff's negligence is plainly inferable, and, since it does not plead exculpation from such negligence, it is insufficient under the rule established in this state that, if the complaint shows that the act of the plaintiff was the proximate cause of the injury, it must set forth the facts showing that he was free from negligence. *Kennon v. Gilmer*, 4 Mont. 433, 2 Pac. 21; *Badovinac v. Northern Pacific Ry. Co.*, 39 Mont. 454, 104 Pac. 543. It is argued that the complaint discloses the peculiarly dangerous character of the crossing, by reason of the fact that a view of the railway track was obstructed from the public road until it reached within 10 feet of the crossing by the trees and brush, and this must be conceded. It is also insisted that the complaint shows that when Nelson and Chappel were 10 feet from the crossing, their view of the track was not obstructed, and therefore it is said their coming into collision with the train on the track must be attributed to their want of ordinary care; for, it is argued, had they stopped 10 feet from the track, they would have been in a place of safety, where they could have seen the approaching train, and could have avoided the accident. It is a legitimate inference to be drawn from the complaint that, for a space of 10 feet before the track was reached at the crossing, a view of the

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track from the public road was unobstructed; but we are not able to agree with counsel for appellant that the conclusion follows from this fact that the collision with the train must have resulted from the negligent act of Nelson and Chappel. They had an equal right with the railway company to use the crossing, and therefore there cannot be any inference of negligence on their part from the fact alone that they attempted to use it. If it could be said that it appears from the complaint that, when Nelson and Chappel reached a point 10 feet from the track, where they could see the approaching train, they were in a place of safety, then we might agree with counsel for appellant in their conclusions; but we cannot say, as a matter of law, that when a man is seated in a buggy to which is attached a team of horses, the horses proceeding towards the track, and the man in the buggy only 10 feet from the track, he is in a place of safety. Whether he would be or not is a question of fact for the determination of a jury; and this, too, notwithstanding the Appellate Court in *Indiana, In Baltimore & Ohio S. W. R. Co. v. Abegglen*, 41 Ind. App. 603, 84 N. E. 566, treated a like question as one of law. We think the complaint is sufficient.

2. The evidence discloses that on the day in question Nelson and Chappel were coming from a point beyond Chestnut to Bozeman, driving in a covered buggy draw by a team of horses, and were leading the team belonging to the plaintiff; that it was raining; that the road was muddy, and the horses and buggy made considerable noise; that for some distance east of the crossing a mountain stream ran between the public road and the railway track, and the waters rushing down this stream likewise made considerable noise; that the trees and brush along this stream obstructed a view of the track from the public road for a quarter of a mile or more east from the crossing; that when these men approached the crossing to a point within a distance of from 10 to 20 feet of the track, their view of the track was then unobstructed; that they were expecting a train along at about that time; that the horses they were driving were gentle, and the men experienced in the handling of horses; that at a point from 100 to 300 feet before reaching the crossing, they stopped and listened for any approaching trains (they could not see the track on account of the trees and brush), and, not hearing any, they continued on. When from 10 to 20 feet from the track and when they first reached a point where a view of the track was unobstructed, they saw the train approaching from the east, coming downgrade, running very fast, apparently coasting and making little noise, and distant from the crossing from 50 to 75 yards. Chappel, who was driving, immediately turned the driving team to the right, apparently in an effort to get away from the track, but the hind wheels of the buggy and the led horses were struck by the train, the horses killed, and the buggy wheels injured. In turn-

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ing the driving team away from the track, one of the horses was forced into a barb wire fence, and was injured. There is some evidence tending to show that from the point where the men stopped, to the point where they first saw the train, they were vigilant in listening for trains, and that the steam whistle on the locomotive drawing the train was not sounded, nor was the bell rung at any point within 80 rods before the crossing was reached. By showing a failure on the part of the railway company to have the whistle sounded at a point between 50 and 80 rods from the crossing, and the bell rung from the point where the whistle was sounded until the crossing was reached, the plaintiff established the negligence on the part of the defendant company. Section 4289, Rev. Codes; *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.

But it is earnestly urged upon us that the evidence shows contributory negligence on the part of Nelson and Chappel, and many cases are cited which have to do with railroad crossing accidents. There is little, if any, disagreement as to the proper rules of law applicable in such cases, and it will not be necessary to review the decisions from other jurisdictions; for, in harmony with the great weight of authority, this court, in *Hunter v. Montana Central Ry. Co.*, above, in considering section 908 of the Civil Code of 1895 (section 4289, above), which required the whistle to be sounded and the bell to be rung, said: "These requirements are for the benefit of the public, and persons traveling upon the public highways have a right to expect a compliance on the part of the railroad company. But failure of obedience on the part of the railroad company to the requirements of the statute does not excuse the citizen from the use of at least ordinary diligence and prudence; so that if one, upon approaching a railroad crossing, intending to pass over it, fails to make a vigilant use of his senses—that is, to look or listen, and to stop for this purpose, if necessary, to learn if there is danger—and by reason of this failure to exercise this precaution he is injured, then he contributes directly to such injury, and cannot be heard to say that the railroad company did him the injury, and should compensate him for its wrong. The injury in such case is attributable to the recklessness and want of care in the person himself." Though directly implied in the language above, the following may be added: "The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective." *Elliott on Railroads* (2d Ed.) § 1166.

These two declarations fairly cover the range of decisions cited by counsel for appellant. When the evidence in this case

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is tested by these rules, we think it cannot be said, as a matter of law, as was done in the Hunter Case, that the plaintiff's own negligence contributed to the injury which he sustained. The facts disclosed in the Hunter Case show such wanton negligence on the part of Hunter and his associates, which directly contributed to Hunter's injury, that any decision of the case other than the one rendered would have done violence to one's senses of justice and the most elementary rules of the law of negligence, while in this instance the evidence shows that Nelson and Chappel were apprehensive of danger; that they stopped at a point from 100 to 300 feet before reaching the crossing and listened for approaching trains; that they were vigilant in listening from that point until they reached a place where the track could be seen; and that as soon as the approaching train was, or could have been, observed, they made efforts to extricate themselves from their apparently perilous situation. Whether, in selecting the point which they did select to stop and listen for approaching trains, Nelson and Chappel exercised ordinary care to make their listening effective, and whether in doing what they did, from that point until the injury occurred, they exercised such care and prudence as reasonable men under like circumstances would have exercised, were questions of fact for the jury to determine, and with the verdict thereon we are disposed to interfere.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

EVANS *v.* PENNSYLVANIA CO.

(Supreme Court of Pennsylvania, Jan. 3, 1910.)

[75 Atl. Rep. 591.]

Railroads—Crossing Accidents—Negligence.*—Where a pedestrian, crossing four railroad tracks at grade, with a clear view of the tracks for 2,148 feet in the direction in which a train came, when it was his duty to stop, look, and listen, was struck by the train, he will be conclusively presumed to have gone negligently into an obvious danger, precluding a recovery for his death.

Appeal from Court of Common Pleas, Allegheny County.

Action by Elizabeth Evans against the Pennsylvania Company. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Affirmed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

M. H. Stevenson and *G. Wm. Jones, Jr.*, for appellant.
R. H. Hawkins, for appellee.

PER CURIAM. That the death of the plaintiff's husband was caused by his negligence in walking in front of a train which he would have seen, had he looked, is clear beyond all doubt. He was an active man, 62 years of age, and had good hearing and good eyesight. He went to West Bellevue station on the defendant's road at noon, with the intention of crossing the tracks at what may be regarded as a public crossing for pedestrians. It was raining, but there was nothing in the condition of the weather that materially limited his range of vision. At this place there were four tracks. He stood on the platform in front of the station, 9 feet from the first track, while a freight train passed east on the third track. From the place where he stood he had a clear view of the tracks east of 2,148 feet. When the freight train had passed, he started across and was struck by the engine of a passenger train running west on the first track. There was not a particle of evidence that he looked towards the approaching train, and the positive evidence on the part of the defendant was that he did not look. But, if he looked, he saw the engine, and took the chance of getting over in advance of it. As stated in the opinion of the learned trial judge:

*For the authorities in this series on the question whether there can be a recovery for injuries inflicted by a train which the high-way traveler should have discovered to be approaching before he made the attempt to cross the tracks, see second foot-note of *Folkmore v. Michigan United Rys. Co.* (Mich.), 32 R. R. R. 328, 55 Am. & Eng. R. Cas., N. S., 328.

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"The attention of the deceased was entirely taken up by the passing freight train, and as soon as that train had passed over the crossing he started to cross the tracks, and was immediately struck by the passenger train, which he could have seen in time to have prevented the accident, if he had looked." The case was clearly within the rule announced in *Carroll v. Penna. R. Co.*, 12 Weekly Notes Cas. 348, and since followed in a long line of cases extending from *Myers v. B. & O. R. R. Co.*, 150 Pa. 386, 24 Atl. 747, to *Walsh v. Penna. R. R. Co.*, 222 Pa. 162, 70 Atl. 1088, that one who is struck by a moving train that was plainly visible from the point he occupied when it became his duty to stop, look, and listen will be conclusively presumed to have gone negligently into an obvious danger. A verdict might properly have been directed at the trial for the defendant, and there was no error in entering judgment for it non obstante veredicto.

The judgment is affirmed.

ILLINOIS CENT. R. CO. *v.* SUMRALL.

(Supreme Court of Mississippi, March 7, 1910.)

[51 So. Rep. 545.]

Railroads—Injuries at Crossings—Contributory Negligence.*—The duty of a person crossing a railroad track and the railroad company to exercise care is reciprocal; but, although the person crossing has a right to assume that the company will not exceed the speed allowed by law, this does not excuse him from the exercise of his faculties of sight and hearing to learn if trains are approaching, and where a person walked between two tracks a distance of 440 yards, and then attempted to cross one of them without ascertaining that a train was approaching, when if he had looked he could have seen it, he was guilty of contributory negligence, barring a recovery, although the company was negligent in running at a rate of speed not allowed by law.

*For the authorities in this series on the question whether a person about to attempt to cross railroad tracks has the right to presume that street cars or trains will not approach at unlawful or excessive speed, see last paragraph of second foot-note of *Clemons v. Chicago, etc., R. Co. (Wis.)*, 31 R. R. R. 491, 54 Am. & Eng. R. Cas., N. S., 491; fourth foot-note of *Kern v. Des Moines City Ry. Co. (Iowa)*, 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29; foot-note of *Atchison, etc., Ry. Co. v. Schriver (Kan.)*, 33 R. R. R. 267, 56 Am. & Eng. R. Cas., N. S., 267.

For the authorities in this series on the question of proximate cause where the person injured by the train or street car, while crossing tracks, was negligent in going upon track and the train or street car was being operated at an unlawful or negligent rate of speed, see last

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Railroads—Operation—Negligence—Unlawful Speed.†—It is negligence for a railroad company to operate its train at a rate of speed forbidden by law.

Appeal and Error—Review—Theory of Case.—Where an action for death at a railroad crossing was brought and tried on the theory of ordinary negligence only by the railroad company, plaintiff cannot claim an affirmance of a judgment for her because the evidence shows willful or wanton negligence.

Appeal from Circuit Court, Copiah County; W. H. Potter, Judge.

"To be officially reported."

Action by Mrs. Allen W. Sumrall against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Mayes & Longstreet, for appellant.

N. W. Sumrall and *J. S. Sexton*, for appellee.

WHITFIELD, C. J. The facts in this case which control, very briefly stated, are as follows: Luther Sumrall, for whose death this suit is brought, left the store of a man named Beechman, very soon before the killing, went east to the depot, and then went north along the common traveled way between the north and south bound tracks of the Illinois Central Railroad, a distance of about 440 yards from the depot crossing, and just as he turned to the right on Finch's crossing in the city of Wesson, and raised his foot to step onto the track, he was struck by the pilot beam of the engine and killed. The declaration was framed on the theory of ordinary negligence merely on the part of the railroad company, the charges were all given upon that theory alone, and the evidence was addressed to sustain that theory of simple ordinary negligence on the part of the appellant. There is not a hint in the declaration, nor in the charges on either side, about willful and wanton negligence on the part of the appellant company. The defense of the railroad company was contributory negligence on the part of the deceased in not exercising the senses of sight and hearing for his own protection. It would seem that he never once, during the 440 yards distance he walked north between the two tracks, turned to look south down the

paragraph of foot-note of *Butler v. Rhode Island Co.* (R. I.), 28 R. R. R. 322, 51 Am. & Eng. R. Cas., N. S., 322; second head-note of *Harris v. Southern Ry. Co.* (Ga.), 27 R. R. R. 508, 50 Am. & Eng. R. Cas., N. S., 508.

†See second foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; second foot-note of *Norfolk, etc., Co. v. Ferrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; sixth head-note of *Wilson v. Puget Sound Elec. Ry. Co.* (Wash.), 32 R. R. R. 311, 55 Am. & Eng. R. Cas., N. S., 311.

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track, when simply to look was to live. It is certain that he did not look; for, if he had looked, he must necessarily have seen the train, and could have easily avoided the danger. It is certainly extraordinary that a normal man would walk up between two railroad tracks a distance of 440 yards, and never once turn to look for an approaching train. Never once does he seem to have thought about a train, until he had raised his foot to go upon the railroad track at Finch's crossing, when, suddenly becoming apprised of his peril, he attempted to draw back, but too late.

The theory upon which the plaintiff below proceeded, as outlined in her charges in this case, was that the deceased had the right to assume that the railroad company would not violate the law by running through this incorporated town at a rate of speed in excess of six miles an hour. Undoubtedly the plaintiff did have the right to indulge that assumption; but it does not at all follow from this right on his part so to assume, that he was, by virtue of his right to indulge such assumption, absolutely absolved from the exercise of the ordinary care required of the average man situated and circumstanced as he was. The deceased had no right, because he could assume that the railroad company would not thus violate the law as to excessive speed, to put his life at hazard on the notion, because of such an assumption, that he could discharge himself absolutely from the exercise of his faculties of sight and hearing, and proceed upon the theory that the company would be liable to him for injury, merely because of such assumption, notwithstanding he might himself fail to exercise in the slightest degree that ordinary care required of the average man, the exercise of which would have relieved him from any peril. The duty of the railroad company and the duty of the plaintiff as to the exercise of ordinary care by each, at the time and place of this killing, was a reciprocal duty, the exact limits of which have never been better stated than in the case of *McGowan v. Illinois Central Railroad Company*, 63 Miss. —, — South. —. It certainly cannot be necessary to do more than to refer again to that case. It is a wholly fallacious line of reasoning which maintains that the railroad company absolutely insures and guarantees the safety of a normal person walking along its tracks, although he may violate all the rules of ordinary care which the situation imperatively demands he should exercise, merely because the railroad company has violated the rate of speed allowed by law. Certainly it was negligence in the railroad company to run through an incorporated town at more than six miles an hour; but just as certainly it was negligence of the most manifest kind for the deceased, situated and circumstanced as he was, to walk up a railroad track 440 yards, without once looking behind to see if a train was approaching, and attempt to cross the track without once looking.

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Here is a case of negligence both on the part of the railroad company and on the part of the deceased. The duties and the obligations of both the deceased and defendant were reciprocal each to the other. The failure of the railroad company to observe its duty did not absolve the deceased from the duty he was under to use, at the time and place and under the circumstances, the care his peril demanded. We think that the peremptory charge to and for the defendant on account of the contributory negligence of the deceased, contributing directly to his own death, on the facts in this record, should have been given. It cannot be said, in view of the course this case took in the court below, that the plaintiff can ask here for an affirmance on the idea that the testimony may show a case of willful and wanton negligence on the part of the defendant company. The case of *Railroad v. Schraagg*, 84 Miss. 125, 36 South. 193, settles that. That plaintiff chose her line of battle in the court below. She stood on the ordinary negligence of the railroad company. She never hinted at willfulness and wantonness on the part of defendant. She stood for compensatory damages only. All her instructions were along that line, and it is too late now to attempt to shift the ground on which a recovery is sought in this court for the first time. If, in view of the testimony set out in the record, the plaintiff had averred willful and wanton negligence on the part of the railroad company, and sought recovery along that line, a very different case would have been presented for our determination. We are limited, however, by the case as it was presented in the court below, and on that case, as shown by this record, a peremptory instruction should have been given for the railroad company.

Reversed and remanded.

McCLELLAND v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas, March 12, 1910.)

[107 Pac. Rep. 545.]

Railroads—Accident at Crossing—Assumption of Risk.—The plaintiff was driving along a highway with a load of hay, and came to a railway crossing. The railway company was engaged at the time in repairing its track and roadbed, and had taken up the crossing and raised the rails several inches. The plaintiff stopped his team, got down from the wagon, went to the crossing, and talked with the foreman in charge of the work. The foreman said he would have the crossing ready for him in a few minutes, and the section men, under the directions of the foreman, put back the crossing boards and threw in some dirt. The foreman then said to him: "The crossing is ready for you. Do you think you can cross?" The plaintiff said he thought he could. In attempting to drive over the temporary crossing, the load of hay was overturned, and the plaintiff was injured. Held, in an action to recover damages, that in using the temporary crossing which had been placed there for his use the plaintiff acted upon his own judgment, with full knowledge of its condition, and that there was no negligence on the part of the railway company which would entitle him to recover.

(Syllabus by the Court.)

Appeal from District Court, Greenwood County; G. P. Aikman, Judge.

Action by George W. McClelland against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

D. B. Fuller and Farrelly & Evans, for appellant.

Richards & Benton (A. B. Miller, of counsel), for appellee.

PORTER, J. In September, 1906, the defendant was making some repairs and improvements to its roadbed and track across a highway in Greenwood county. In doing the work it became necessary to remove the plank crossing and to raise the rails of the track several inches. After the crossing planks had been removed, and while the section men were engaged in raising and surfacing the track, the plaintiff approached the crossing with a load of hay. When within about 50 feet of the track he stopped his team, got down off the wagon, went to the crossing, and talked with the foreman. The foreman said he would have the crossing ready for him in a few minutes, and the section men, under the direction of the foreman, put back the crossing boards and threw in some dirt. The foreman then said to him: "The crossing is ready for you. Do you think

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you can cross?" The plaintiff said he thought he could. The railway crosses this highway running northeast at an angle of about 45 degrees, and the plaintiff was traveling north. Just before he started over, one of the section men advised him to drive squarely across, so that the front wheels would strike the rail at the same time. The plaintiff, however, drove straight ahead, and the left wheels of the wagon dropped off the rails just as the right wheels mounted them. The jolting of the wagon overturned the load, throwing the plaintiff to the ground, causing the fracture of a bone in the foot and other injuries to the ankle. This action was to recover damages for his injuries. The case was tried before a jury, and a verdict rendered in favor of the defendant. A new trial was denied, and the plaintiff brings this appeal.

One complaint is that the instructions as a whole were incomplete and misleading. There were no intricate questions of law involved in the case. The issues were simple. There was no serious conflict in the evidence, and nothing to require elaborate instructions. The instructions fairly covered all the questions, and, besides, the plaintiff made no request for any instructions. Particular complaint is made of the eighth instruction, which reads as follows: "(8) If the plaintiff got off of his wagon upon arriving at the crossing in question, and stood by and saw the condition the crossing was in, and saw and knew the manner in which it was fixed, and knew that it was being fixed for him to cross over, and, knowing the manner and condition, expressed his approval thereof, and stated in substance that it was all right, and thereupon drove onto and over the crossing, and was injured in so doing, by reason of the manner in which it had been fixed for him to cross, then and in that case he cannot recover." We think this correctly states the law as applied to the facts. True, as the plaintiff argues, it was the duty of the defendant to maintain and keep its highway crossings in a safe and suitable state of repair; but the rule has no possible bearing on a case of this kind. In order that a railway company may fulfill this obligation, it must have an opportunity to make necessary changes and repairs in its roadbed at public crossings. If the defendant had completed this change in the crossing, and had left it in an unsafe condition, a different question would arise. That would have been a failure to keep and maintain the crossing in sufficient repair. But here the defendant was engaged in the work of changing its track at a highway. There was no crossing there when the plaintiff drove up. A temporary one was put in for the purpose of allowing him to cross at that time. If, in his judgment, he could safely do so. *City of Horton v. Trompeter*, 53 Kan. 150, 35 Pac. 1106, and other cases cited, in which it is held that it is not necessarily negligent

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for a person to use a sidewalk or street after he had notice that it is out of repair, have no application here. It was not necessarily negligent for the plaintiff to attempt to use this crossing. The evidence shows that another person drove over it safely with a load of hay a few minutes after the plaintiff's attempt and while the crossing was in the same condition. After the section men had fixed it for the plaintiff, he determined, with full knowledge of its condition, that he could safely use it, and voluntarily made the attempt.

There is a complaint that the instructions failed to define contributory negligence correctly. The law of contributory negligence was not involved to any serious extent. Before he could recover, it was necessary for the plaintiff to show that the defendant was guilty of some negligence. Unless it was negligence in some duty it owed to him, it would make no difference whether his negligence contributed to the injury, or it was caused by an accident. There was no evidence of any negligence on the part of the defendant; and it would not have been error if the court had sustained a demurrer to the evidence, or had directed a verdict in favor of the company.

The judgment is affirmed. All the Justices concurring.

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err., v.
B. MAZURSKY. (No. 58.)

SOUTHERN EXPRESS COMPANY, Plff. in Err., v. E. E. McTEER.
(No. 59.)

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err., v.
R. KEITH CHARLES. (No. 60.)

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err., v.
A. VON LEHE. (No. 61.)

ATLANTIC COAST LINE RAILROAD COMPANY, Plff. in Err., v.
A. VON LEHE. (No. 62.)

(Argued December 9, 1909, Decided February 21, 1910.)

[30 Sup. Ct. Rep. 378.]

Commerce—State Regulation—Carrier's Liability.—Penalizing the failure of a common carrier to adjust and pay within a specified time claims for loss or damage, as is done by South Carolina act of February 23, 1903, § 2, does not unlawfully interfere with interstate commerce, even as applied to shipments from without the state, where the statute is construed by the state courts as affecting only the liability of carriers doing business in the state, for property lost or damaged while in their possession.

Five writs of error to the Supreme Court of the State of

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South Carolina to review judgments affirming judgments below, penalizing the failure of common carriers to adjust and pay within a specified time claims for loss or damage. Affirmed.

See same case below, No. 58 (S. C.) 58 S. E. 931; No. 59 (S. C.) 58 S. E. 930; No. 60, 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927; No. 61, 78 S. C. 167, 59 S. E. 1135; No. 62, 78 S. C. 168, 59 S. E. 1135.

Statement by MR. CHIEF JUSTICE FULLER:

By the act of the general assembly of the state of South Carolina, entitled, "An Act to Regulate the Manner in which Common Carriers Doing Business in This State Shall Adjust Freight Charges and Claims for Loss of or Damage to Freight," approved February 23, 1903 (No. 50, Acts of S. C. 1903, p. 81), it was enacted:

"Section 1. Be it enacted by the general assembly of the state of South Carolina, That from and after the passage of this act, all common carriers doing business in this state shall settle their freight charges according to the rate stipulated in the bill of lading: Provided, The rate therein stipulated be in conformity with the classifications and rates made and filed with the Interstate Commerce Commission, in case of shipments from without this state, and with those of the railroad commissioners of this state, in case of shipments wholly within this state; by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers: and it shall be the duty of such common carrier to inform any consignee or consignees of the correct amount due for freight, according to such classifications and rates; and upon payment or tender of the amount due on any shipment, or on any part of any shipment, which has arrived at its destination, according to such classifications or rates, such common carrier shall deliver the freight in question to the consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject each such carrier so failing or refusing to a penalty of \$50 for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by suit in any court of competent jurisdiction.

"Sec. 2. That every claim for loss of or damage to property while in the possession of such common carrier shall be adjusted and paid within forty days, in case of shipments wholly within this state, and within ninety days, in case of shipments from without this state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment: Provided, That no such claim shall be filed until after the arrival of the shipment or of some part thereof at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with

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interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of \$50 for each and every such failure, to be recovered by any consignee or consignees aggrieved in any court of competent jurisdiction: Provided, That unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid: Provided, further, That no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of § 1710, vol. 1, of the Code of Laws of South Carolina, 1902."

Section 1710, volume 1, of the Code of Laws of South Carolina, 1902, is as follows:

"When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order;' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivering, or terminal road, upon notice of such loss, damage, or destruction being given to it by the shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days after such notice, or to trace such freight or express, and inform the said party so notifying when, where, and by which carrier the said freight or express was lost, damaged, or destroyed, within said forty days, then said carrier shall be liable for all such loss, damage, or destruction in the same manner and to the same extent as if such loss, damage, or destruction occurred on its lines: Provided, That if such initial, terminal, or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage, or destruction occurred, [it] shall thereupon be excused from liability under this section."

The above-entitled cases were brought to test the validity of the provisions of § 2 of the act of February, 1903, when applied to claims for loss or damage to interstate freight.

In each case the objection that that section was unconstitutional and invalid was seasonably made. In each case the objection was overruled and judgment given in favor of the respective claimants, plaintiffs, for the value of the undelivered freight, with the full penalty of \$50 added.

The opinion of the supreme court of South Carolina, construing and applying the provisions of the state statute, appears in the printed transcript of the record in case No. 60 (*Charles v. Atlantic Coast Line R. Co.*, 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927). In each of the other cases the principles assumed

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to have been settled in and by that opinion were made the basis of the judgment of the state supreme court.

The cases were submitted to this court December 9, 1909, as one case, and argued as such on one side only. On the 20th of December, this court entered an order that notice of the pendency of these cases should be given to the attorney general of South Carolina, and leave was given to him to file a brief as *amicus curiæ* on or before the 3d day of January, if he should be so advised. The attorney general filed a brief accordingly January 3, 1910; Townsend was with him on the brief.

Messrs. Frederic D. McKenney, P. A. Willcox, F. L. Willcox, Henry E. Davis, and J. P. K. Bryan, for plaintiffs in error.

Messrs. J. Fraser Lyon and W. H. Townsend, as *amici curiæ*.
No counsel for defendants in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

In No. 60 (*Charles v. Atlantic Coast Line R. Co.*), which was assumed by the supreme court of South Carolina to settle all the others, and to have been made the basis for the judgment of that court in all the cases, the state court found, as matter of fact, "the evidence showed that defendant was in possession of the goods lost," and held as matter of law "that the statute in question, as it affects carriers doing business in this state who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment."

It is thus apparent that the statute is construed by the court as only concerning property lost or damaged while in the possession of a carrier in the state of South Carolina.

It is this conclusion of law that the plaintiff in error asks this court to review.

In *Benning v. Atlantic Coast Line R. Co.*, 78 S. C. 55, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768, 58 S. E. 983, it was expressly decided that the act did not apply to claims for loss of property which never came into the possession of the defendant. In that case the state supreme court considered an act of May, 1903, and held it, for the reason given, to be unconstitutional, not as obnoxious to the 14th Amendment of the Constitution of the United States and the Constitution of South Carolina, but as amounting to an illegal attempt to regulate interstate commerce. And that "on principle, as well as under the authority of *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514, it is impossible to avoid the conclusion that the act of May, 1903, here under consideration, is unconstitutional." And further, that it was evident from the complaint that the action was intended to rest on the invalidity, under the act of May, 1903, of such a contract as § 1710 contemplates, and that therefore that section could have no application.

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The court then considered the act of February, 1903, and said:

"The section of main importance here is the second, which provides for the recovery for loss of or damage to freight, and penalties for failure to adjust and pay such loss or damage within a certain time. The question vital to this case is whether the statute can be construed to impose upon one connecting carrier, liability for the default of another, unless such carrier obtains and gives the information, or uses due diligence to obtain it, as provided in § 1710 of the Civil Code. We do not think it can be so construed.

"The main enactment as to the recovery of damages and penalties thus begins in § 2: 'That every claim for loss of or damage to property *while in the possession of such common carrier* shall be adjusted and paid within forty days,' etc. The words we have italicized clearly limit the loss and damage which a carrier is required to adjust and pay for to that which befalls while the goods are in the possession of such carrier, and excludes the idea of liability for loss or damage to the goods while in the possession of another carrier.

"It is true there is a proviso at the end of this section, 'that no common carrier shall be liable under this act for property which never came into its possession, if it complies with the provisions of § 1710, vol. 1, of the Code of Laws of South Carolina, 1902.' But as the body of the act does not make the carrier liable at all 'for goods which never came into its possession,' a *proviso* which exempts from liability for loss of or damage to such goods on certain conditions can have no effect. The act imposes no liability to which the exemption can be applied.

"The rule is that all parts of a statute, including *provisos*, are to be construed together, and effect given, if possible, to all. But it is contrary to reason as well as authority to *extend by implication a proviso* to cover that which is opposed to the express language of the main enactment. *Southgate v. Goldthwaite*, 1 Bail. L. 367; *United States v. Dickson*, 15 Pet. 141, 10 L. ed. 689; *The Irresistible*, 7 Wheat. 551, 5 L. ed. 520; 26 Am. & Eng. Enc. Law, p. 681; Endlich, Interpretation of Statutes, §§ 184, 185. The fact that the statute is penal adds force to this conclusion. We are of the opinion that the *proviso* of § 2 has no effect, and the act only imposes penalties upon the carrier for failing to adjust claims for loss occurring while the goods are in its own possession.

"It follows, the plaintiff in this case cannot sustain his recovery on the ground that the defendant was liable, under the act of February, 1903, for goods lost by a connecting carrier, because it failed to obtain and give information of the kind required in cases falling under that act, or to use due diligence to obtain such information.

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"This penalty act of February will apply to the case, if the finding on the new trial should be that the loss occurred on the defendant's road, but not otherwise. It is attacked as unconstitutional under the interstate commerce clause of the constitution of the United States. That question is discussed and decided against the defendants contention in *Charles v. Atlantic Coast Line R. Co.*, 78 S. C. 36, 125 Am. St. Rep. 762, 58 S. E. 927."

In *Charles v. Atlantic Coast Line R. Co.*, *supra*, the action was brought in a magistrate court to recover the value of four sacks of rice, alleged to have been shipped from New Orleans, Louisiana, by Martin J. Wynne, to the plaintiff at Timmonsville, South Carolina, and to have been lost while in the possession of the defendant carrier, and also to recover \$50 penalty for failure to adjust and pay the claim within ninety days as prescribed by the act of February 23, 1903. The magistrate gave judgment against defendant for the amount claimed, and that judgment, on appeal, was affirmed by the circuit court, and then again by the supreme court of the state in this case. The supreme court held that the last proviso of the 2d section of the act of February, 1903, had no application to carriers into whose possession the goods had come, and referred to the opinion of the court in *Seegers Bros. v. Seaboard Air Line R. Co.*, 73 S. C. 71, 73, 121 Am. St. Rep. 921, 52 S. E. 797, where it was said: "The duty to make prompt settlement for loss or damage to goods is but an incident of the duty to transport and deliver safely and with reasonable diligence. The statute in question was designed to effectuate an important public purpose; viz., to compel the common carrier to perform with reasonable diligence the duty which peculiarly appertains to his business as a carrier of freight. The penalty is but a means to that end." And see same case, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28.

The supreme court, after making that quotation, thus proceeded:

"While it is not easy to define the exact limits of the operation of state laws as affecting interstate commerce, we have no hesitation in saying that the statute in question, as it affects carriers doing business in this state, who fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. The penalty imposed is for a delict of duty appertaining to the business of a common carrier; and in so far as it may affect interstate commerce, it is an aid thereto by its tendency to promote safe and prompt delivery of goods, or its legal equivalent—prompt settlement of proper claim for damages. No penalty can attach except upon the establishment in a court of a default of duty imposed by statute. The

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statute does not attempt to regulate interstate commerce, and imposes no tax or burden thereon. It is supported by the general principle declared in *Sherlock v. Alling*, 93 U. S. 99, 104, 23 L. ed. 819, 820, and enforced in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, and *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, that state legislation 'relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within the territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'

In the case of *Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934, a statute of Georgia requiring telegraph companies to transmit and deliver dispatches with impartiality, good faith, and diligence, under penalty of \$100 in each case, in the absence of legislation by Congress on the subject, was held not to be an unwarrantable interference with interstate commerce as to messages without the state, and Mr. Justice Peckham, delivering the opinion of the court, said, p. 660:

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce, within the meaning of that clause of the Federal Constitution under discussion? We think not."

And see *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 137, 42 L. ed. 692, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 491, 48 L. ed. 273, 24 Sup. Ct. Rep. 132; *Missouri P. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 624, 53 L. ed. 361, 29 Sup. Ct. Rep. 214. The present cases fall within the rules there laid down, and *Central R. Co. v. Murphey*, 196 U. S. 195, 49 L. ed. 445, 25 Sup. Ct. Rep. 218, 2 A. & F. Ann. Cas. 514; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; and *McNeill v. Southern R. Co.*, 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722, cited to the contrary, are really not in conflict therewith.

Judgments affirmed.

DOWNEY v. NORTHERN PAC. RY. CO.

(Supreme Court of North Dakota, Feb. 25, 1910.)

[125 N. W. Rep. 475.]

Carriers—Carriage of Live Stock—Regulation of Speed—Police Power.*—An absolute requirement that it shall be the duty of every railroad, railroad corporation, railway company, express company, car company, and of every common carrier other than by water, by whatever name it may be called or by whomsoever operated, and which is wholly or in part engaged in the transportation of any kind of live stock by railroad within or to or from any point in this state, to transport any and all such live stock so by it being transported with the utmost diligence, and to maintain within this state in all trains so transporting any such live stock an average minimum rate of speed of not less than 20 miles per hour from the time any such live stock is loaded upon or into its cars until such train reaches its destination, deducting only in the computation of such average minimum rate of speed such reasonable time as any such live stock may be necessarily delayed in unloading to feed, water, and rest, and in feeding, watering, and resting and in reloading, is unconstitutional and void as an unreasonable exercise of the police power of the state.

(Syllabus by the Court.)

Appeal from District Court, Grand Forks County; Templeton, Judge.

Action by Larry Downey against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Ball, Watson, Young & Hardy, for appellant.

Skulason & Burtncss, for respondent.

CARMODY, J. On June 13, 1907, plaintiff shipped two horses over defendant's road from Grand Forks, N. D., to Valley City, N. D., by way of Winnipeg Junction, Minn. He brought this

*For the authorities in this series on the constitutionality of statutes prescribing penalties to compel common carriers to perform their duties to the public, etc., see first foot-note of *Southern Ry. Co. v. State (Miss.)*, 33 R. R. R. 52, 56 Am. & Eng. R. Cas., N. S., 52; *St. Louis, etc., Ry. Co. v. Wynne (Ark.)*, 33 R. R. R. 459, 56 Am. & Eng. R. Cas., N. S., 459; foot-note of *Caughman v. Columbia, etc., R. Co. (S. Car.)*, 32 R. R. R. 272, 55 Am. & Eng. R. Cas., N. S., 272.

For the authorities in this series on the subject of the police powers of a state over railroads, see foot-note of *St. Louis, etc., R. Co. v. McNamare (Ark.)*, 33 R. R. R. 713, 56 Am. & Eng. R. Cas., N. S., 713; fourth head-note of *National Car Ad. Co. v. Louisville & N. R. Co. (Va.)*, 33 R. R. R. 179, 56 Am. & Eng. R. Cas., N. S., 179; *Southern Ry. Co. v. State (Miss.)*, 33 R. R. R. 52, 56 Am. & Eng. R. Cas., N. S., 52.

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action to recover upon two causes of action: (1) For alleged actual damages resulting from defendant's delay in completing the shipment; and (2) to recover the statutory penalty provided in sections 4398, 4399, Rev. Codes 1905. At the trial of the action, it was stipulated as follows: "That the Northern Pacific Railroad Company owns and operates a branch line of railroad running from Grand Forks, N. D., across the Red river to and through East Grand Forks, in the state of Minnesota, and thence to Winnipeg Junction, where said branch line connects with the main line of said railway; that said main line owned and operated by the defendant runs from St. Paul, Minn., westerly to and through Winnipeg Junction, thence westerly through Minnesota, across the Red river to Fargo, N. D., and thence westerly to and beyond Valley City, N. D.; that said company also owns and operates in the state of North Dakota a branch line running from Sanborn, a station on the main line near Valley City, to and through Rogers, N. D.; that the distance by the route described from Grand Forks, N. D., to East Grand Forks, Minn., is .6 of a mile; thence to Winnipeg Junction is 95 miles; thence to Fargo is 26 miles; thence to Valley City is 57.9 miles, a total of 179.5 miles, of which about 121 miles are in the state of Minnesota and the remainder in the state of North Dakota; that it was expected and intended by both parties to the shipment made by the plaintiff that the horses so shipped should be carried between Grand Forks, N. D., and Valley City, N. D., over the route and the lines just described." The car arrived in Fargo about 5 o'clock Friday morning, and was spotted at the stock chute in Valley City, N. D., so that it could be unloaded at 6 o'clock Saturday evening. The distance between Fargo and Valley City is 57.9 miles. It was 37 hours from the time the car arrived in Fargo until the horses were unloaded at Valley City; while if defendant had maintained the minimum rate of speed of 20 miles per hour, provided for in section 4398, Rev. Codes, the distance would have been covered in three hours. The case was tried to a jury. The court ruled at the close of the evidence that no actual damages had been sustained, and that no recovery could be had upon the first cause of action. Defendant moved for a directed verdict upon all of the issues, which was denied; the court holding that the statute fixing the penalty for delay in shipment was valid, and the number of hours delay being agreed upon at 34, the court directed a verdict in plaintiff's favor for \$170. An exception was reserved to the court's refusal to direct a verdict for defendant and to his direction to find a verdict for the plaintiff. In due time the defendant moved for judgment notwithstanding the verdict or for a new trial upon a statement of the case. The motion was denied, and judgment entered upon the verdict. From the judgment so entered and from the order denying de-

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defendant's motion for judgment notwithstanding the verdict, or for a new trial, this appeal is taken.

The decision of this case depends wholly upon the construction of sections 4398, 4399, Rev. Codes. Section 4398 reads as follows: "It shall be the duty of every railroad, railroad corporation, railway company, express company, car company and of every common carrier other than by water, by whatever name it may be called or by whomsoever operated and which is wholly or in part engaged in the transportation of any kind of live stock by railroad within or to or from any point in this state, to transport any and all such live stock so by it being transported, with the utmost diligence, and to maintain within this state in all trains so transporting any such live stock an average minimum rate of speed of not less than twenty miles per hour from the time any such live stock is loaded upon or into its cars until such train reaches its destination, deducting only in the computation of such average minimum rate of speed such reasonable time as any such live stock may be necessarily delayed in unloading to feed, water and rest and in feeding, watering and resting and in reloading." Section 4399 provides for a penalty for the violation of said section 4398.

Appellant contends that said sections 4398 and 4399, are void for the following reasons: (1) They are repugnant to article 1, § 1, of the Constitution of North Dakota; are an unreasonable exercise of the police power. (2) Said statutes are repugnant to the fourteenth amendment to the Constitution of the United States. (3) Upon the facts established in this case the shipment in question was an interstate shipment, and said statutes as to such shipment are repugnant to the Constitution of the United States as a regulation of commerce of the United States.

Article 1, § 1, of the state Constitution, provides that acquiring, possessing, and protecting property is an inalienable right. The fourteenth amendment to the Constitution of the United States, as far as material here, is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Congress has the exclusive power to regulate commerce with foreign nations, and among the several states and with the Indian tribes. Respondent contends that the sections of the statutes referred to can be and ought to be upheld on the broad ground that the control of states over the speed of railway trains carrying live stock within their borders is merely a reasonable exercise of their police power for the health, comfort, protection, or convenience of their citizens. The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided

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cases, by applying the principles therein enunciated, determining from these whether in the particular case, the rule be reasonable or otherwise. The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked. Judges not infrequently differ in their reasons for a decision in which they concur. The correct rule, however, seems to be that state legislation which seeks to impose a direct burden upon interstate commerce or interfere directly with its freedom does encroach upon this exclusive power of Congress.

A statute requiring all railroad companies operating lines within the state of Ohio to cause three each way of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over three thousand inhabitants for a time sufficient to receive and let off passengers, held a valid exercise of the police power of the state, even though it applies to interstate trains. *Lake Shore & Mich. Southern Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702. In this case the opinion is written by Justice Harlan and covers 20 pages, containing a full review of the authorities. The case, however, was decided by a divided court; Justices Shiras, Brewer, White, and Peckham dissenting. A state statute imposing a penalty for lack of due diligence in delivering a telegram, if made in a reasonable exercise of the police power of the state, is not an unconstitutional interference with interstate commerce as applied to interstate messages, in the absence of any legislation by Congress on the subject. *Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105. A state statute prohibiting the running of freight trains on the Sabbath was held not invalid as interfering with interstate commerce, though, in effect, it prohibits trains from passing through the state on that day from and to adjacent states, but held an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the state. *Hennington v. State of Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166.

Article 284, Rev. St. Tex., requiring a common carrier of live stock to feed and water it sufficiently pending carriage, otherwise to be liable to the owner in damages and a penalty, is a police regulation, and, as applied to an interstate shipment, where the default complained of occurred entirely in Texas, is no infringement of the power of Congress to regulate interstate commerce, nor in conflict with Rev. St. U. S. § 4386 *et seq.* (U. S. Comp. St. 1901, p. 2995), forbidding an interstate railroad to confine stock in cars longer than 28 hours without unloading, for rest, water, and feeding, for 5 hours, under penalty recoverable by civil action. *Gulf, C. & S. F. Ry. Co. v. Grav et al.* (Tex. Civ. App.) 24 S. W. 837. In this case the court says: "The shipment in this case had its initial point in this state at

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Santa Anna, and its terminus at West Point, Miss., and may be conceded to be an interstate shipment; but the matter complained of for which the penalty is asked all occurred within this state on defendant's road. In such case it is believed our statute should be enforced. To do so would not be an illegal interference with the act or the powers of Congress. Our statute intended to protect both animals and the owner, and its enforcement would be the legitimate exercise of the state's police power. So applied, it is not an attempt to regulate interstate commerce in such sense as to infringe upon the exclusive right of Congress. Const. U. S. art. 1, § 8. Our statute does not regulate interstate commerce, or have the effect of doing so in an interstate shipment any more than if it were to punish the company for theft of the shipment in transit in this state to another state. It is a police regulation, and, as such, is within the power of the state Legislature."

The case of *Crawford v. Southern Ry. Co.*, 56 S. C. 136, 34 S. E. 80, relied upon by the respondent, is not in point. In that case the court held that the law providing that no railroad company in the carrying or transportation of animals shall overload its cars, when applied to shipments made from a point within to a point without the state, is not unconstitutional as violating the provision in the Constitution of the United States granting Congress power to regulate interstate commerce. The court further held that under a statute which provides that railroad companies shall load and unload stock in transit every 24 hours for rest, and that the shipper shall feed and water them while resting, and, in case of his default, the company shall do so, a company failing to perform said duties is not relieved from liability to the shipper for injury to stock in transit, by reason of the shipper's failure to keep a special contract, under which he should ride on the transporting train and look after such loading and unloading. In *Railroad Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, it was held that a statute of a state providing that no contract shall exempt any railroad corporation from the liability of a common carrier or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the state under a contract for interstate transportation contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce. The case was this: The plaintiff while traveling in the caboose of a freight train of defendant, upon which his cattle were being transported under a special contract, was injured by reason of defendant's negligence, and brought his action for damages. One of the defenses set up was that by a clause in the special contract under which plaintiff and his cattle were carried it was, among other things, agreed that, in consideration

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of a reduced rate of charges, "the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of \$500." The plaintiff obtained a verdict for \$1,000, and the case was eventually carried to the Supreme Court of the United States, where the only question was whether the statute of Iowa in which state the injuries were received was in conflict with the interstate commerce clause of the United States Constitution; it being conceded that the shipment of the cattle was an interstate shipment. We quote liberally from the opinion of the court delivered by Mr. Justice Gray: "Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of the state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within the state, to the protection of that state, as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance committed within its limits. * * * It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to punish and redress. The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the rights and duties of all persons and corporations within its limits. States may lawfully regulate the sale of railroad tickets when such regulation does not operate so as to affect or impair the cost of tickets or the rate of fare charged for interstate travel. States may also by reasonable laws control the speed of trains, the stops of trains unless interfering materially with interstate commerce, the running of trains on Sunday, the licensing of engineers, or track connections and terminal facilities, or may limit the hours of labor of railroad employees. We think the law in question does not come within any of the principles hereinbefore stated, nor within the prin-

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ciples laid down in the cases hereinbefore cited, and is unconstitutional and void, being an unreasonable exercise of the police power of the state. *Houston & Texas Central Ry. Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772; *Cleveland, etc., Ry. Co. v. Ill.*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868; *Ill. Central Ry. Co. v. Ill.*, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107.

An analysis of all the prior important cases upon the constitutionality of such laws is found in the opinion of the court in *Cleveland, etc., Ry. Co. v. Ill.*, *supra*. In this case the railroad company attacked the constitutionality of a law, which is as follows: "Every railroad corporation shall cause its passenger trains to stop upon its (their) arrival at each station advertised by such corporation as a place of receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety." In this case the railroad company operated the Knickerbocker Special, a train devoted to carrying interstate transportation between the city of St. Louis and the city of New York. The state admitted that the railroad company furnished a sufficient number of regular passenger trains, four each way a day, to accommodate all the local and through business along the line of its road, and that all of such trains stopped at the county seat, but sought to uphold the law on the ground that it was a proper police regulation. The court says: "It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats, it is difficult to see why the Legislature may not compel them to stop at every station. * * * If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others." The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and draw-bridges, and to reduce the speed of train when running through crowded thoroughfares, requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and time-tables to be posted at proper places, and other similar requirements contributing to the safety, com-

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fort and convenience of their patrons—is too obvious to require discussion.” The case of Houston & Texas Central Ry. Co. v. Mayes, *supra*, is nearer in point to the case at bar than any cited by appellant or respondent. This case involves the constitutionality of certain laws of Texas requiring any railroad company to furnish cars at any point of its road within a certain number of days after the written request of a shipper for such cars, and providing a penalty of \$5 a car for each day after the limited time to be recovered by the shipper in civil action. The law was held unconstitutional by a divided court, Mr. Justice White taking no part, and the Chief Justice, Mr. Justice Harlan and Mr. Justice McKenna dissenting. In this case the court says: “While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary, and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires washouts, or other unavoidable consequences of heavy weather.”

The statute in question makes no exception in cases of sudden congestion of traffic, and no allowance for interference of traffic occasioned by wrecks or other accidents, the breaking of bridges, accidental fires, washouts, snow storms, or other unavoidable consequences of heavy weather.

The judgment and order appealed from are reversed, and the district court will render a judgment dismissing the action. All concur; ELLSWORTH, J., concurring specially.

THOMPSON v. MISSOURI, K. & T. RY. CO. OF TEXAS.

(Supreme Court of Texas, March 23, 1910.)

[126 S. W. Rep. 257.]

Carriers—Transportation of Goods—Discrimination—Penalties—Construction of Statute.—Rev. St. 1895, art. 4574, which provides that a railroad company, which shall fail or refuse, under regulations of the Railroad Commission, to receive and transport without discrimination tonnage, etc., destined to any point on or over the line of a connecting carrier, shall be guilty of unjust discrimination, and providing a penalty, though penal, must be construed in the light of the modern rule that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment.

Carriers—Right of Shipper to Designate Route.*—A shipper has the right to designate the route by which his goods shall be carried by the different railroads over which they are destined to pass.

Carriers—Carriage of Goods—Discrimination—Connecting Lines—Change of Route—Construction of Statute—"Deliver."—Rev. St. 1895, arts. 4574, 4575, provide that a railroad company which refuses to transport and "deliver," without discrimination, tonnage, etc., destined to any point on or over the lines of any connecting line, shall be guilty of unjust discrimination, and provides a penalty. A shipper at a station, having no freight agent, made out bills of lading routing car loads of lumber over a specified connecting line, and his wishes in the matter were known by the railroad. The conductor, who accepted the bills, erased, at the instance of the railroad, from the bill of lading such routing, and routed the goods over another line, by which they would secure a longer haul. The cars were placed on the track of the specified connecting line, and were in the "physical possession" of such line, but, by reason of a threat of the initial carrier that they would divert all its shipments from that line unless they followed the railroad's routing, such connecting line routed the lumber as fixed by the railroad, though it knew of the wishes of the shipper. Held, that the word "deliver" in the statute would be construed to mean more than physical delivery, and hence the fact that it was delivered to the designated connecting carrier, but not controlled and routed on its own line because of the action of the initial carrier, was a discrimination by the initial carrier, for which the penalty was recoverable.

*See extensive note, 8 R. R. R. 150, 31 Am. & Eng. R. Cas., N. S., 150; first head-note of Chicago, etc., Ry. Co. v. Woodward (Ind.), 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7; first head-note of Steidl v. Minneapolis, etc., R. Co. (Minn.), 16 R. R. R. 668, 39 Am. & Eng. R. Cas., N. S., 668.

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Carriers—Carriage of Goods—Discrimination—Change of Route—Waiver by Shipper.—Where a shipper at a station having no freight agent leaves car loads of lumber to be shipped, with directions that they be routed over a specified connecting line, and the conductor taking up the cars, at the instance of the company, disregards the instructions, and leaves bills of lading routed over a different connecting line, there is no waiver of right to insist that the change in routing was an unjust discrimination, under Rev. St. 1895, arts. 4574, 4575, by accepting the bill of lading as so left.

Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by James A. Thompson against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment of the Court of Civil Appeals (118 S. W. 618) reversing a judgment for plaintiff, plaintiff brings error. Reversed, and judgment of lower court affirmed.

Cochran & Penn, for plaintiff in error.

Fiset & McCleendon and *D. K. Woodward, Jr.*, for defendant in error.

BROWN, J. We copy from the opinion of the honorable Court of Civil Appeals the following statement and findings of fact:

"This suit was instituted by the appellee to recover penalties for unjust discrimination provided for in article 4574 of the Revised Civil Statutes.

"Findings of Fact.

"At the time of filing this suit, and for some years prior thereto, the appellee was engaged in the business of retailing lumber at Taylor, in Williamson county, Texas. He purchased a large amount of his lumber from the Thompson-Tucker Lumber Company at its mills at Willard, a small station situated on the line of the appellant railway company running from Trinity in Trinity county, through Corrigan in Polk county, to Colmesneil in Tyler county. On different dates between April 1, 1906, and September 5, 1907, the appellee purchased of the aforesaid lumber company 57 car loads of lumber delivered f. o. b. the cars at Willard, for the purpose of having the same shipped to him at Taylor, and which was thereafter so shipped and delivered on different dates during that period of time. There were three routes by which such shipments could be made from Willard to Taylor; one over the appellant's T. & S. line to Trinity, thence over the I. & G. N. Railway to Houston, and from there over another line of the appellant's to Taylor; another from Trinity over the I. & G. N. Railway to Palestine, and thence over the same company's line to Taylor; still another from Wil-

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lard to Corrigan, thence over the Houston, East & West Texas Railway to Houston, and from there over the appellant's line to Taylor. The distances from Willard to Taylor over these respective routes were as follows: Over the first mentioned, 278 miles; the second, 236 miles; and the third, 272 miles. Over each route the Railroad Commissioner had established a rate, which was the same for all. The appellee had for some time previous to the first-mentioned date, and during all of the time the shipments were made, desired that his lumber should be carried over the appellant's line to Trinity, thence over the I. & G. N. Railway via Palestine to Taylor, claiming that it reached its destination by that route in a shorter time, and for other personal reasons. Acting for him in the method of routing the shipments, the agents of the Thompson-Tucker Lumber Company, on the several occasions when each of the 57 cars of lumber were to be delivered to the appellant for shipment, and before they were received by the appellant at Willard, tendered to the appellant's agents in charge of the trains upon which the cars were to be shipped, duplicate receipts upon the following blank form:

Willard, Texas, 190..

Delivered by Thompson & Tucker Lumber Company to M.,
K. & T. R. R. Co.

In apparent good order, the articles named below, to be delivered
in like good order, without unnecessary delay.

To

At

Via

Marks

As per conditions of Company's Bill of Lading.

..... Lumber.

Initial	Car No.
.....

.....Conductor.

Train No..... 190..

"The blanks 'To,' 'At,' and 'Via' in each of the 57 receipts were filled in in pencil so as to read '*To order J. A. Thompson, Taylor, Tex., care I. & G. N. Ry. Co. at Trinity, Texas, for continuous transportation by I. & G. N. Via Trinity, Palestine and I. & G. N. Ry.*' In the shipment of January 10, 1907, all the words in pencil (italics above) were erased; in 24 of the shipments the words 'for continuous transportation by I. & G. N. (via) Trinity, Palestine and I. & G. N. Ry.' were erased; and in the balance the words 'Trinity, Tex., for continuous transportation by I. & G. N.' (via) 'Trinity, Palestine and I. & G. N. Ry.' were erased.

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"The bill of lading referred to in the above-mentioned receipt was that found on one of the blank forms in general use by the appellant railway company. Among other provisions, that form contains an undertaking on the part of the appellant to deliver the freight at the point of destination if that point is on its line; if not, then to deliver to its next connecting carrier; and also a provision limiting its liability for damages to that which occurs upon its own line.

"There was no local agent at Willard, and the bills of lading, or receipts as they are called, were signed by the conductors in charge of the trains. The receipts were usually tendered by an agent of the lumber company called the 'shipping clerk.' This clerk was not present upon all of the occasions when the cars and receipts were tendered to the appellant for transportation. In most of the instances, whether present or not, a note was attached to the duplicate receipts left for the conductor to sign, in which he was requested that unless he would handle the cars according to the routing instructions given in the receipts not to undertake to handle them at all. The officials in charge of the management and control of the appellant's line were well aware of the desire of the appellee that the cars containing his lumber should be routed by way of Trinity and Palestine over the I. & G. N. Railway to Taylor; and the agents of the lumber company, at the time they tendered the duplicate receipts above referred to, in addition to the note attached, verbally requested that those wishes be carried out. The conductors, however, acting under orders from their superiors, disregarded those instructions, made the erasures before mentioned, and after doing so signed the receipts and delivered them to the shipping clerk of the lumber company if he was present, and, if not, left them where they could be obtained by him upon his return, and then would take charge of the car, transport it to Trinity, and there deliver it to the I. & G. N. Railway Company accompanied by a waybill providing for its carriage to Houston and there to be delivered again to the appellant for shipment to Taylor.

"The court found that the appellee accepted those receipts as signed after the erasures showing the routing via Palestine had been made, and allowed the appellant to take charge of the cars of lumber, with no routings except those remaining upon the receipts as shown. The testimony is sufficient to show that the desire of the appellee to have his cars containing the lumber shipped from Willard to Taylor routed by way of Palestine over the I. & G. N. Railway, while well known to the appellant and the officials in charge of that department of its business, had been uniformly disregarded, and all of the 57 cars were routed by way of Trinity and Houston, and thence over the appellant's main line to Taylor. The reason given by the appellant's general freight agent was that he desired his

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company to get the benefit of the long haul from Houston to Taylor, which it would not do if the routing was by way of Palestine over the I. & G. N. Railway. At the time these shipments were made there was in effect between the appellant and the I. & G. N. Railway Company a traffic agreement by which it was understood between the two companies that all freight originating on the appellant's T. & S. branch and destined to points on or over appellant's line south of Waco should be carried by way of Houston. This traffic agreement was then on file with the Railroad Commission, but there was no other evidence of whether or not it had been approved by the Commission.

"Some time previous to the date of any of the shipments here under consideration there had arisen between the appellant and the appellee a similar controversy concerning the routing of his lumber from Willard to Taylor. This controversy ultimately resulted in a suit by appellee for the statutory penalties, but the litigation was settled by compromise. During the time of that controversy, the general freight agent of the appellant had informed the freight agent of the I. & G. N. Railway Company that if the latter company did not respect appellant's routing of shipments originating at Willard destined to Taylor by way of Houston, all of the freight originating at Willard would be carried by way of Corrigan over the H., E. & W. T. Railway to Houston, thus diverting that traffic from the I. & G. N. Railway Company. By reason of this threatened diversion of the traffic the I. & G. N. Railway Company thereafter followed the routing indicated in the waybills delivered to it by the appellant company. The refusal of the appellant to deliver the 57 cars of lumber to the I. & G. N. Railway Company with appellee's routing instructions contained in the receipts made out at Willard is the basis of this suit."

Article 4574, Rev. St. subd. 2, contains this language: "Every railroad which shall under such regulations as may be prescribed by the Commission, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the lines of any connecting line of railroad, shall be deemed guilty of unjust discrimination."

Article 4575, Rev. St., reads as follows: "In case any railroad subject to this chapter shall do, cause to be done, or permit to be done any matter, act or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad shall be liable to the person or persons, firm or corporation injured thereby for the damages sustained in consequence of such violation; and in case said railroad company shall be guilty of extortion or discrimination as by this chapter defined, then, in addi-

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tion to such damages, such railroad shall pay to the person, firm or corporation injured thereby a penalty of not less than one hundred and twenty-five dollars nor more than five hundred dollars, to be recovered in any court of competent jurisdiction in any county into or through which such railroad may run."

The defendant in error invokes the rule that penal statutes must be strictly construed, and the honorable Court of Civil Appeals adopted the suggestion, applying the rule in its extreme rigor to the facts of this case. The rule upon this subject which now prevails, being sustained by the best authority, is forcibly expressed by Chief Justice Fuller of the United States Supreme Court in the case of *United States v. Lacher*, 134 U. S. on page 629, 10 Sup. Ct., on page 627 (33 L. Ed. 1080), by the following quotation from Mr. Sedgwick on Statutory and Constitutional Law: "The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or, rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope.' This passage is quoted by Baron Bramwell in *Attorney General v. Sillem*, 2 H. & C. 532, as one 'in which good sense, force and propriety of language are equally conspicuous, and which is amply borne out by the authorities, English and American, which he cites.'" That quotation expresses the rule of construction that is applicable to the facts of the case now before us. *State v. Kansas City, etc., R. R. (C. C.)* 32 Fed. 726; *Pike v. Jenkins*, 12 N. H. 261. In the case last cited the court said: "In construing penal statutes the proper course is to search out and to follow the true intent of the Legislature, and to adopt that sense which harmonizes best with the context, and promotes, in the fullest manner, the apparent policy and objects of the Legislature.'"

In order to determine the proper construction of the language of the articles above quoted from the Revised Statutes, it is necessary that we should ascertain the purpose and intent of the Legislature in enacting them. Thompson had the undoubted right in shipping his cars of lumber to designate the route by which they should be carried by the different railroads over which they were destined to pass. *Inman v. St. L. & S. W. Ry. Co.*, 14 Tex. Civ. App. 39, 37 S. W. 37. This right is not controverted by the defendant. That undoubted right would be of little avail to shippers over railroads in this state if there were not some provision for enforcing its observance. We must

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look to the language, the subject of legislation, the right to be secured and the evil to be remedied to determine the purpose and intent of the Legislature as embodied in article 4574, and, judging from the facts of this case, the remedy is not more than adequate. If a fair construction of the language used in the law, in view of the purpose of its enactment, will embrace the acts of the defendant shown by the evidence, then the evidence establishes a cause of action against the defendant. If, however, the acts, which are claimed to be a violation of the statute, do not come within the terms of the statute when construed as we have stated, then the court cannot inflict the penalty, no matter how unjustly the railroad has treated Thompson. The paramount rule for construing statutes of any class is to ascertain what the Legislature intended to prescribe by the language used, "all others are helps," to the accomplishment of that purpose.

The crucial point in this case is to determine the meaning of the word "deliver," as used in article 4574. The honorable Court of Civil Appeals held that "a physical delivery" is all that our statute requires; that is, delivery without the right of control satisfies the law. The purpose of enacting articles 4574 and 4575 was to enforce the right of the shipper to route his shipment according to his own wishes. To do this the law provides that in case the railroad company should refuse to "receive," "to transport," or "to deliver" the property so shipped to a connecting carrier, to be by it transported over its line to its destination, such carrier, so refusing, should be held to be guilty of discrimination, and being guilty of discrimination would be liable to the penalty prescribed in article 4575. Now, let us test the meaning placed upon this language by the defendant and by the honorable Court of Civil Appeals in the construction of the word "deliver." There is no question made as to the fact of the cars having been hauled to the point of connection with the connecting carrier, but the whole case depends upon whether or not the defendant in error, within the meaning of the law, delivered the cars to the International & Great Northern Railroad Company. The object of the shipper in directing the delivery of the cars to the International & Great Northern Railroad Company was to have that railroad transport them to the place of destination on that road—that is, Taylor. Obedience to the law required that the delivery should be such as would secure to Thompson that right. The defendant in error placed the cars upon the tracks of the International & Great Northern Railroad—that is, it placed them in its possession in the sense of a "physical possession"; but, in doing so, it imposed conditions which defeated the accomplishment of the purpose to have the connecting line transport the goods to Taylor. By its course of dealing defendant in error held the control and

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legal possession of the cars. In no sense consistent with the purpose of the Legislature or with the rights of the shipper can such "physical possession" be called a lawful delivery. We are of opinion that the defendant in error was guilty of arbitrarily disregarding the rights of Thompson to designate the line of railroad upon which his cars should be carried to their destination, and, by refusing to accord to him that right, acted willfully in defiance of the law of the state, forcing the cars against the will of the owner to be carried over a different route than that which had been designated for their transportation.

Schloss v. Atchison, Topeka & Santa Fé Railway Company, 85 Tex. 601, 22 S. W. 1014, was to recover a penalty given by law for failure to deliver goods which had been transported to their destination where the charges shown in the bill of lading were paid. The charges for the transportation of the goods in that case did not appear in the bill of lading as the statute specified, and this court held that the failure to deliver the goods under such circumstances did not come within the terms of the law which denounced the penalty. The distinction between that case and this is that the "expense account" could not by the most liberal construction be made to embrace a bill of lading, and as the statute imposed a penalty for the failure to deliver when the expenses were shown in the "bill of lading" to have been paid, there could be no recovery; while in this case the penalty is inflicted for the failure to deliver to the connecting carrier, a definite act prescribed by law. The act which is claimed to be a violation of a penal law must be fairly within its terms to sustain an action for the penalty.

In *San Antonio & Arkansas Pass Railway Co. v. Stribling*, 99 Tex. 319, 89 S. W. 963, three cars were included in a bill of lading which specified that they should be carried to Giddings and there delivered to the Houston & Texas Central Railway Company to be transported to Graphite on the Houston & Texas Central Railroad. The shipper instructed verbally that the cars should be delivered at San Antonio to the International & Great Northern Railroad Company and then carried to Austin, and there delivered to the Austin & Northwestern Railroad Company. With reference to the three cars this court held that the contract itself specified the route and destination, and therefore it must prevail over the parol instruction given by the shipper. In the same case was embraced a claim for damages for another car shipped from the same point by the same party and over the same railroad in which the bill of lading expressed the destination as Graphite. The shipper gave instructions that the cars should be delivered at San Antonio to the International & Great Northern Railroad Company to be carried to Austin and thence by the Houston & Texas Central Railroad to Graphite, but the carrier disregarded these instructions as to routing

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the car, and carried it as it did the other three to Giddings and then to its final destination. This court held that the shipper had the right to specify the routing of his car, and that the refusal to obey the instruction made the railroad company liable for the penalty specified in article 4575. There is practically no difference between the decision as to the one car embraced in the case just referred to and this; the principles which govern the two cases being the same. The shipper's right to route the car and the duty to deliver to the connecting carrier were involved in that case as in this.

It is insisted on part of the defendant in error that Thompson, by receiving the bill of lading which specified the route by which the defendant company forced the International & Great Northern Railroad Company to haul the cars, waived his right to route the freight. But there was no consent on the part of Thompson by acceptance of the bill of lading or by signing any contract in connection with it, as in the Stribling Case. The Missouri, Kansas & Texas Railroad Company, by its agent, erased the instructions given in the form of the receipt provided for it to sign, and inserted its own terms. It disregarded the instructions of Thompson's agent, that it should not take the cars except upon the direction to carry according to his routing, and left for him bills of lading or receipts which expressed its own mind, but not that of the shipper. One mind cannot make a contract. This was no contract between Thompson and the railroad company, but was a high-handed disregard of Thompson's legal rights and a forcible taking and carrying of his property according to its own wishes without consent on his part, but to serve its unlawful purpose. He had no choice when the cars reached Taylor but to receive them, and by so doing he did not in any way ratify the unlawful acts of the defendant.

The defendant in error insists that there was no evidence to justify the court in finding that it had taken the possession of the cars of the shipper without his consent, but we are of opinion that the testimony was amply sufficient to justify the conclusion of the trial court on this point. We conclude that the honorable Court of Civil Appeals erred in reversing the judgment of the district court and in rendering judgment in favor of the railroad company; it is therefore ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the district court be affirmed.

BERRY *et al.* v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota, Jan. 26, 1910.)

[124 N. W. Rep. 859.]

Carriers—Contract against Negligence.—Under the direct provisions of Civ. Code, § 1583, a carrier cannot be exonerated by any agreement, made in anticipation thereof, for gross negligence.

Carriers—Carriage of Live Stock—Action—Question for Jury.—Whether delays in the transportation of horses and broken timbers on the side of the car upon which the horses injured themselves were the result of gross negligence was for the jury, where different conclusions might have been drawn from the evidence.

Appeal and Error—Review—Verdict.—A verdict is conclusive where different conclusions might have been drawn.

Carriers—Carriage of Live Stock—Measure of Damages.—What horses would have sold for on the horse market, and what they did sell for, is a proper method of determining the difference in value between sound and injured animals, in an action against a carrier for delay in their transportation and for their negligent injury, as what property actually sells for on the open market is *prima facie* evidence of its real market value.

Evidence—Expert Testimony—Competency of Witness.—A witness who had been dealing in horses, and shipping from 400 to 500 annually for 15 years, mostly to a certain market, was competent to testify on the market value of horses, as sound and as injured, at such market.

Carriers—Carriage of Live Stock—Admissibility of Evidence.—Where a live stock transportation contract required notice in writing of injury or loss, letters by the shipper to the claim agent itemizing the loss were the best evidence that notice was given and properly admitted.

Carriers—Carriage of Live Stock—Kind of Cars.*—A live stock carrier must furnish a car reasonably safe and suitable, in view of the kind, character, and nature of the stock to be transported.

Carriers—Carriage of Live Stock—Duty to Furnish Suitable Car.—A carrier cannot relieve itself of its failure to provide a suitable car by a stipulation in the bill of lading devolving upon the shipper the duty of selecting a suitable car.

Carriers—Carriage of Live Stock—Actions—Instructions.—A request to charge that, if injury to horses was as likely to have been caused by their natural propensity to kick and fight as by negligence of the carrier, the shipper was not entitled to recover was properly

*For the authorities in this series on the subject of the duty of railroads, as common carriers, to furnish cars and other facilities, and without discrimination, see first foot-note of *Oliver & Son v. Chicago, etc., Ry. Co.* (Ark.), 32 R. R. R. 449, 55 Am. & Eng. R. Cas., N. S., 449.

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refused, where under the evidence the shipper might have recovered even if the jury found for the carrier on such proposition, as it was not restricted to damages resulting only from kicking and biting.

Carriers—Carriage of Live Stock—Limitation of Value—Validity.†—Where the value agreed upon for horses shipped was so out of harmony with their actual value as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, such value will be considered as a mere attempt by the carrier to secure partial exemption from liability, and of no effect in relieving it from the obligation of responding for the real value of the horses.

Appealed from Circuit Court, Davison County.

Action by A. C. Berry and another against the Chicago, Milwaukee & St. Paul Railway Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Preston & Hannett and Charles E. Vroman, for appellant.
A. E. Hitchcock, for respondents.

McCoy, J. The plaintiffs, who are purchasers and shippers of live stock, delivered to defendant as a common carrier three car loads of horses to be transported by railroad to Chicago, Ill., and there delivered to J. S. Cooper, at the United States stock-yards. Two car loads of said horses were delivered to defendant at Tripp, S. D., January 4, 1907, and the other car was delivered at Plankinton, S. D., on March 15th, the same year. The plaintiff claims that in the transportation and carriage of said horses the defendant so carelessly and negligently transported the same that by reason thereof said horses became bruised, maimed, and otherwise injured; that said negligence consisted in unnecessary and unreasonable delay, and unreasonable and unnecessary unloading and reloading thereof; that from the time the two car loads shipped from Tripp were reloaded at Mitchell, S. D., at 2 o'clock p. m., January 5th, until 3 o'clock p. m., January 7th, when they arrived at Chicago, said horses were not unloaded from said cars in which they were loaded, and were not given any water, feed, or other care; that at Mitchell, by direction of defendant, the said horses were unreasonably and unnecessarily unloaded and reloaded, some of them on two different occasions, and during which the weather was inclement, and the chutes icy and dangerous to use, and that by reason of such unnecessary and unreasonable unloading and reloading over such icy and dangerous chutes many of said horses became lame and otherwise injured; that in the trans-

†See foot-note of *Winslow Bros. Co. v. Atlantic Coast Line Co.* (N. Car.), 33 R. R. R. 752, 58 Am. & Eng. R. Cas., N. S., 752.

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portation of said horses they were by direction of defendant put into unsound and unfit cars, that the timber along the side of one car became broken, and the ragged edges thereof caused injury and damage by bruising and cutting the legs of many of said horses; that by reason of the keeping of said horses in the said cars for such unreasonable length of time without food, water, or other care caused them to become nervous, uneasy, and vicious, thereby causing them to kick, bite, and otherwise injure themselves; that when said horses were delivered to defendant they were sound, and had been purchased for the purpose of sale on the Chicago market; that by reason of defendant's said negligence they became bruised, maimed, and otherwise injured and damaged, all to the damage of plaintiff in the sum of \$687.50; and that within 30 days after the occurrence of such damage the plaintiff duly presented to defendant a claim in writing for the said damage to said horses, and that said damage was not due to any act or default or negligence on the part of plaintiff. Defendant denied the negligence complained of, and alleged that said horses were shipped by defendant under and by virtue of the terms of a written contract, and not otherwise; that said contract contained the condition that the defendant, for loss, injury, or damage for which it may be responsible, shall be liable to the extent only of the agreed valuation upon which the rate of compensation for such transportation is based, and that by such contract the value of only \$100 each was placed on said horses; that said contract further provided that defendant should not be liable as an insurer of said horses transported under said contract; that the company, defendant, should not be liable for the acts of the animals to themselves or to each other, such as biting, kicking, etc., nor for the loss or damage arising from the condition of the animals, nor from their jumping from the cars, nor from loading or unloading; that the defendant should not be liable for the injury or damage of said stock by or on account of the delay thereof during its transportation, and it does not agree to deliver said stock at destination at any specific time; that the shipper, the plaintiff, had examined the cars in which said live stock was loaded, and has accepted the same as being in proper condition for the transportation thereof; that no claim for loss, injury, or damage to said live stock, nor for delay or decline in the market, nor for injury to the owner or person in charge thereof, shall be valid unless presented to the company in writing within 30 days after the same shall have occurred. The defendant alleged that if there was any delay or injury thereby in the transportation of said horses, the plaintiff was not entitled to recover therefor by reason of the terms of said contract; that plaintiff cannot recover for the injury caused by the biting or kicking of said horses, by reason of

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their vicious and unruly habits, by reason of the terms of said contract; that the plaintiff by the terms of said contract examined the cars in which said horses were shipped, and accepted the same as being in proper condition for the transportation thereof, and cannot recover for such injury on that account; that no claim in writing for damage to said horses, nor for delay, nor for decline in market, was presented to this defendant within 30 days after the alleged injury or damage occurred; and that by reason of said failure the plaintiff cannot recover. The case was tried to a jury, and a verdict for \$525 rendered in favor of plaintiff, and judgment thereafter entered. Motion for new trial was made and overruled, and the defendant now brings the question to this court, assigning various errors.

The first eight assignments of error relate to the sufficiency of the evidence to sustain the verdict. It will serve no useful purpose to therein recite all the evidence. We have reviewed the entire testimony, and are of the opinion that the evidence was sufficient to sustain the verdict. There is much conflict in the evidence on many salient points, all of which have been resolved in favor of the plaintiffs by the verdict of the jury. Under the statute of this state a common carrier cannot be exonerated by any agreement or contract, made in anticipation thereof, for gross negligence of himself or his servants. Civ. Code, § 1583. The question of gross negligence under this statute was submitted to the jury under proper instructions. The evidence tends to show many delays on the part of defendant in the transportation of said stock, and that these horses were kept confined in the cars for something like 48 hours at one time without food or water; and the evidence tends to show broken slats and timbers on the side of a car, and that such slats and timbers were rotten and decayed and covered over with paint, and all of which plaintiff claims injured many of said horses physically. Whether or not such delays and breakages were the result of gross negligence, under the circumstances of this case, was a question for the jury, as different conclusions might be drawn therefrom, and the verdict of a jury, under such conditions, is conclusive.

It is insisted by defendant that the evidence fails to establish the true and correct measure of damages, in that, it shows what the horses sold for sound, and what they were resold for, and this does not show how much less the animals would have sold for on the Chicago market at the time when received there by reason of their alleged damaged condition. Plaintiff A. C. Berry testified that he had been buying and selling horses for 20 years—about 400 to 500 yearly—and had shipped mostly to Chicago, that all these horses were sound when delivered to defendant, and that when received at Chicago they were gaunt, drawn, bruised, lame, and cut up. He testified what

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these horses, individually and separately, would have sold for if sound, and what they did sell for in their damaged condition; that after receiving them at Chicago he took good care of them, employing veterinary surgeons to treat and care for them, and that he was about two weeks in disposing of them. We are of the opinion that what these horses would have sold for on the horse market, and what they did sell for on the horse market at Chicago, at the time referred to in the question asked the witness, is proper method of determining the difference in value between uninjured and injured animals. What property actually sells for on the free and open market is *prima facie* evidence of its real market value, but is not conclusive. While the evidence in this case is not as direct as it might have been on this question, yet we are of the opinion that it is substantially sufficient. The witness, one of plaintiffs, who is presumed to know the value of his own property, was asked to state the difference in value between each horse claimed to have been damaged, in its damaged condition, and what it would have been worth had it not been damaged at the time it reached Chicago, and he answered that the mare (No. 37) would have sold for \$225 sound, and she sold for \$157 lame and bruised, and the witness continued so on down the list of horses claimed to have been damaged, in the same manner. Considering the former statements of the witness that he shipped these horses to Chicago for the purpose of sale on the market, and that these horses were delivered at the stockyards at Chicago, and were at such place at the time to which the testimony of this witness refers, the only logical inference from the answer of the witness, in the light of the question asked, is that this mare, had she not been injured, would have sold for \$225 on the market in Chicago, at the time she reached the stockyards, and that she sold within two weeks thereafter for \$157 in her lamed and bruised condition on the same market. We are of the opinion that this was one proper method of establishing the real market value of said horses as sound and as injured. The fact that this witness had been dealing in horses, and shipping from 400 to 500 annually for the last 15 years, mostly to the Chicago markets, rendered this witness competent of testifying on that subject. Johnson Commission Co. v. Wabash Ry. Co., 64 Mo. App. 595; 26 Cyc. 819; Harrison v. Glover, 72 N. Y. 451.

The defendant contends that the court erred in admitting in evidence, over defendant's objections, plaintiff's Exhibits B and C, being two letters written by plaintiffs to the claim agent of defendant, specifying therein by items the amount of injury and loss to the horses in question, claimed by plaintiffs to have occurred by reason of negligent delays and breakage of cars. The plaintiffs contend that the sending of such letters to defendant, notifying it particularly of what plaintiffs claimed in

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relation to such loss, was required by the terms of such contract under which said horses were shipped, and that these letters constituted the best evidence as to notice of such claim to defendant. We are of the opinion that this ruling was correct. The provisions of the contract made evidence of this character permissible.

Defendant has 29 assignments of error relating to rulings of the trial court in sustaining and overruling objections to the introduction of evidence, and it would be impracticable to refer to each of these assignments separately. After careful consideration we are of the opinion that no prejudicial error exists therein.

The defendant contends that the court erred in instructing the jury of its own motion, relative to the broken car, that cars must be properly constructed and safe for shipment if they are to accommodate large and heavy horses. The instruction given by the court is as follows: "Now, gentlemen, in the transportation of live stock by a carrier, the cars that are furnished by the carrier for that purpose must be properly constructed, and safe and suitable for the transportation of the stock offered for shipment; reference being had to the kind and character and value of such stock. That is, when a carrier takes live stock to ship, it must take into consideration the kind and character of live stock, and furnish a car that is safe and suitable for the transportation of that particular kind of stock. If it is large, heavy, strong horses, the car must be proportionately safe and strong. In other words, it would require a stronger and better car to transport large, heavy, strong horses than it would to transport, for instance, a load of sheep or hogs or calves. Every carrier must take notice of the fact that large, heavy, young, strong horses, or horses that are unbroken, require a stronger vehicle, a much more safe and sound vehicle in construction than it would some smaller or less powerful animal. They must furnish a car which is suitable and safe for the transportation of that particular kind of stock. They must take notice of the fact that horses and cattle are liable to exert a force upon the car, tax its strength in proportion to the size and strength of the animal, its disposition, its character, and whether it is broken, or whether it is unbroken and wild and vicious in disposition. Now the carrier is not bound to furnish the safest and most approved cars that can be found. It is enough that they are reasonably safe and suitable for the purposes for which they are furnished. The fact that the cars used are those which the carrier always uses is no defense, if in fact they are not suitable. So the question is up to the jury: Was the car furnished a car which was reasonably safe and suitable for the transportation of this stock, taking into consideration the kind and character and the nature of the stock

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to be transported?" We are of the opinion that this instruction correctly stated the law. Hutchinson on Carriers, § 509, and sections 495 to 508, inclusive.

Defendant also contends that the instruction was not applicable to the evidence in this case, for the reason that the contract under which the horses were shipped provided that plaintiff had seen and accepted the cars in which said horses were shipped. The plaintiff testified that the timbers and slats of the broken car were rotten and decayed, and that such rotten and decayed condition of the car was covered over with paint, so that the unsound condition could not be determined by inspection. But we are of the opinion that this position is not tenable. Section 508, Hutchinson on Carriers, reads as follows: "As we have seen, the duty of furnishing suitable vehicles rests upon the carrier, and not upon the shipper, and the failure to discharge this duty is negligence from the consequences of which the carrier is not permitted to free himself by a stipulation in the bill of lading which devolves upon the shipper the duty of selecting vehicles which are suitable. Such a stipulation is void, as an attempt by the carrier to limit his liability against his own negligence in providing defective vehicles. But if the shipper freely and voluntarily chooses not to rely upon this absolute duty to furnish suitable vehicles, and takes upon himself for a sufficient consideration, in the form of a reduced rate of otherwise, the duty of selecting vehicles which are suitable for the goods he intends to have carried, he cannot hold the carriers liable for injuries arising from such patent defects as he ought to have discovered in his examination of the vehicles. But as to those defects which are not such that an ordinary inspection by the shipper would bring them to his attention, and yet are such that a reasonably careful inspection by a person experienced in such business would lead to their detection, an inspection and acceptance of the vehicle by the shipper will not save the carrier harmless from damages due to such defects, unless it can be shown that they were actually pointed out to the shipper, and that he accepted the vehicle with full knowledge of their existence. The burden of proof in a case of actual selection by the shipper is on the shipper to prove that a defect was not patent when he examined the vehicle." *Betts v. C., R. I. & P. Ry.*, 92 Iowa, 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558.

The defendant requested the following instruction which the court refused: "If you shall believe from all the evidence in this case that the injury to the horses in the Tripp shipment was as likely to have been caused by the natural propensity of the animals to kick and to fight, if any such has been shown, as by the negligence of defendant, if any, then the plaintiffs are not entitled to recovery." Defendant assigns the ruling of the

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court refusing this instruction as error. We are of the opinion that this instruction was properly refused, as it is not applicable to the evidence in the form in which requested. The last clause of this instruction reads: "Then the plaintiffs are not entitled to recovery." Under the evidence in this case the plaintiffs might be entitled to recovery even if the jury had found in favor of defendant on the proposition presented by this instruction. The refused instruction was not properly qualified so as to restrict its operative effect to damages resulting only from kicking and biting of the horses composing the Tripp shipment. The other requested instructions of defendant were also properly refused.

It is also contended by appellant that under the terms of the special contract of shipment plaintiffs could only recover that proportion of the value of the animals as declared in the special contract which said value bears to the actual value of the animals injured; the value of said horses being, by the terms of said contract, limited to \$100 each. That if the defendant was liable under the evidence on account of its negligence, then it is only liable for that proportion of the damage sustained which it bears to the declared value of the horses as compared with the actual value. We are of the opinion that this position of appellant is not tenable. It seems to be the rule that if the sum fixed by the shipping contract is fixed without any reference to the real value of the goods, the limitation will be considered as an attempt by the carrier to secure a partial exemption from liability, and, in so far as its validity is concerned, it will stand on the same footing as any other condition intended to secure immunity from the consequences of negligence, and if a loss occurs which is attributable to the carrier's negligence, a condition by which it is attempted to fix the amount recoverable at a certain sum, irrespective of the real value of the goods, cannot avail the carrier, and the owner may recover to the full extent of his actual loss. *Hutchinson on Carriers*, § 425. It also seems to be the rule in some jurisdictions that the carrier, in order that he may exercise a degree of care and attention commensurate with the risk assumed, is entitled to be informed of the value of the goods intrusted to him for transportation, and a contract as to the value of the goods to be shipped, when fairly entered into with a view of placing a bona fide value on the goods, will be conclusive on the owner, and the carrier will not be liable for a greater sum than that at which the goods are valued, although his own misconduct has caused their loss, and that damages sustained under such a contract would be proportioned relatively to the value fixed by the contract as compared with the actual value. *Hutchinson on Carriers*, § 426. "But, while the owner of goods and the carrier may fix a value on the goods beyond which the carrier, in the event of loss,

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will not be liable, the agreement fixing the value, in order to be conclusive on the owner, must be bona fide and the value reasonable. If, for instance, the value agreed upon should be so far below the real value of the goods that from their appearance the carrier must have known the discrepancy, the agreement fixing the value would not be bona fide, and, depending on no value at all, would amount to an arbitrary limitation upon the carrier's legal liability which, in the event of loss occasioned by negligence, would not deprive the owner of the right to recover the real value of the goods. While it is true that the owner of goods of great value which are concealed in packages, or otherwise hidden from view, upon which a very inconsiderable value has been placed by him, will be precluded, in case of loss, from the right to recover a greater sum than the value which he has placed upon them, the reason for this exception is that to charge the carrier with their real value when by the owner's misrepresentation he has been induced to undertake the employment at a reduced compensation, and to lessen the degree of care and vigilance which he otherwise would have exercised, would be to sanction fraud, and to enable the owner to gain an unfair advantage over the carrier through his own misrepresentation. The knowledge which the carrier has of the real value of the goods tendered to him for shipment would therefore seem to be material in determining the effect of the valuation agreement upon his liability, although a contrary conclusion has been reached by some courts. And it may be stated as the better rule that, where the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value upon the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligation of responding for their real value where his misconduct has occasioned their loss. So, in the absence of fraud or concealment on the part of the owner of the goods whereby the carrier has been misled, the valuation agreed upon, it is said, must be reasonable, regard being had to the real value of the goods; and, if such value be unreasonable, the owner will not be stopped from claiming damages on the basis of their real value." The foregoing quotation from section 427, *Hutchinson on Carriers*, meets with our approval. When we take into consideration that the undisputed evidence shows that the horses in question were young farm animals weighing about 1,400 lbs. each, and averaging in value something over \$250 each, it is very easily discernible that the parties never attempted to fix a bona fide value thereon. The difference between the real value and the value

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as fixed by the contract is too great; is too unreasonable. The appellant's agents authorized to receive these horses for transportation had ample opportunity to know the real or approximate value thereof, and could not by any means have been misled in relation thereto. It does not appear from the evidence that as a matter of fact the value of these horses, or horses of this class, had anything to do with fixing the freight rate thereon. The only reference thereto is in the recitals of the contract, and which would as readily lead one to infer that the freight rate was based on weight rather than value; that all common horses of the class shipped under this contract go at the same rate regardless of value. Therefore we are constrained to the view that the limitation of value of \$100 each, mentioned in the terms of said contract, was placed therein without any reference to the real value of the particular horses shipped under this contract, and that under the circumstances of this case such limitation should be considered as an attempt by respondent to secure partial exemption from liability, and stands on the same footing as any other condition intended to secure immunity from the consequences of negligence.

Finding no error in the record, the judgment and order denying a new trial are affirmed.

STRINGFIELD v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, March 9, 1910.)

[67 S. E. Rep. 333.]

Carriers—Contract of Shipment—Stipulation against Negligence.*

—A carrier cannot contract to be relieved, in whole or in part, from liability for damages caused by its negligence.

Carriers—Contract of Shipment—Limiting Liability to Agreed Amount.†—A provision in a carrier's contract of shipment, limiting liability to an agreed amount, is invalid where the injury is caused by the carrier's negligence.

Brown and Walker, JJ., dissenting.

Appeal from Superior Court, Haywood County; Ferguson, Judge.

Action by one Stringfield against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

*See first foot-note of *Wisecarver & Stone v. Chicago, etc., Ry. Co.* (Iowa), 33 R. R. R. 728, 56 Am. & Eng. R. Cas., N. S., 728; first foot-note of *McIntosh v. Oregon R. & N. Co.* (Idaho), 33 R. R. R. 768, 56 Am. & Eng. R. Cas., N. S., 768.

†See last foot-note of preceding case.

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Civil action to recover damages for injuries done to a mare, shipped over the lines of defendant company, and attributed to negligence on part of defendant and its employees.

There was evidence to the effect that the mare in question was a valuable animal, standard bred, about six years of age, with fine qualities and great speed, and was bought by plaintiff from W. A. Davis, Esq., at Lettsworth, La., in September, 1906, for \$450; that she was shipped from Lettsworth to New Orleans, and there reshipped to plaintiff at address, Waynesville, N. C., on September 25, 1906; that the ordinary time between the points was something like four days, but the mare did not arrive at Waynesville until October 9th, having been sent to a wrong place and by improper routes, and by reason of this delay and lack of proper care and attention, she arrived finally at Waynesville in a very bad plight and condition, and was thereby seriously and permanently injured; that the charge for freight and feed paid by plaintiff amounted to \$56.50, and plaintiff testified that the mare at Waynesville, in good condition, would have been worth from \$1,000 to \$1,500, and in her actual condition, and owing to damage done in shipment, she was not worth more than \$125 to \$150. There was other testimony as to the high value of the mare, her excellent condition when received for shipment, and the great damage done by lack of proper care and attention on the route. The mare was shipped in a single car, under an ordinary live stock contract in which it was stipulated: "That should damage for which said carrier may be liable, the value at the date and place of shipment shall govern the settlement; and in which the amount claimed shall not exceed for stallion or jack \$150.00, for horse or mule \$75.00, for mare and colt together \$100, and which amount it is agreed are as much as such animals as are herein agreed to be transported are reasonably worth," etc.

Defendant offered no evidence, and there was no testimony of any representations made as to the value of the mare, nor any inquiry made by defendant's agents as to such value, or any agreement or bargaining together on such value, except as contained in the printed ordinary live stock contract, signed by the shipper at the time the mare was received. On the argument the plaintiff did not insist as a basis of adjustment on the value, except at the place of shipment, and in the charge, on the question of damages, the court instructed the jury that, this position having been taken by plaintiff, the jury could not in any event act upon a greater valuation, and they were further instructed that, if damages were allowed, they could add to the amount of the injury done the \$56.50 costs for feed and transportation between the shipper and receiving party. In apt time, and with other requests, the court was asked by defendant to charge the jury specially: "(4) That if the shipper declared

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the value of the mare, and the carrier accepted the same in good faith as the real value, and the freight rates was based thereon, then the stipulation is valid and binding upon the plaintiff, and the plaintiff is now estopped to claim a greater amount than the agreed valuation in the contract. (5) That in no view of the case is the defendant entitled to recover more than \$75." Which requests were refused, and the defendant excepted.

The jury rendered the following verdict:

"(1) Was the plaintiff's mare injured by negligence of defendant, as alleged in complaint? Answer: Yes.

"(2) If so, what damages is plaintiff entitled to recover? Answer: Three hundred and fifty-six dollars and 50-100."

Judgment on the verdict, and defendant excepted and appealed.

W. T. Crawford, for appellant.

W. B. Rodman and *Moore & Rollins*, for appellee.

HOKE, J. It is a principle well established in this state that a common carrier in its contract of shipment cannot stipulate against recovery for a loss or damage occasioned by its own negligence, and it can make no such stipulation as to either total or partial loss. Speaking to this question, in *Everett v. Railroad*, 138 N. C. 71, 50 S. E. 558 (1 L. R. A. [N. S.] 985), the court said: "It is the law of this state, declared by repeated decisions, that common carriers are not permitted to contract against loss occasioned by their own negligence. They can contract neither for total nor for partial exemption from loss so occasioned. *Capehart v. Railroad*, 81 N. C. 438 [31 Am. Rep. 505]; *Gardner v. Railroad*, 127 N. C. 293 [37 S. E. 328]. The same doctrine is very generally accepted in other jurisdictions. It would be an idle thing for the courts to declare the principle that contracts for total exemption from such loss are subversive of public policy and void, and, at the same time, permit and uphold a partial limitation which could avail to prevent anything like adequate and substantial recovery by the shipper. Therefore it is held that any limitation of liability by contract designed for the purpose is forbidden." And the doctrine so stated is declared and sustained in numerous cases here, and in other courts of recognized authority. *McConnell v. Railroad*, 144 N. C. 90, 56 S. E. 559; *Parker v. Railroad*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827; *Mitchell v. Railroad*, 124 N. C. 238, 32 S. E. 671, 44 L. R. A. 515; *Capehart v. Railroad*, 81 N. C. 438, 31 Am. Rep. 505; *Calderon v. Steamship Co.*, 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033; *Railway v. Solan*, 169 U. S. 135, 18 Sup. Ct. 289, 42 L. Ed. 688; *Railway v. Lockwood*, 84 U. S. 357, 21 L. Ed. 627; *Moulton v. Railway*, 31 Minn. 85, 16 N. W.

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497, 47 Am. Rep. 781; *Railway v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Hudson v. Railroad*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550; *Railway v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170; *Railway v. Keener*, 93 Ga. 808, 21 S. E. 287; *Express Co. v. Backman*, 28 Ohio St. 156.

In those states, however, where the principle indicated more fully obtains, it has been held that, when properly understood and applied, it does not prevent parties from agreeing upon the valuation of a given shipment which shall form the basis of adjustment in case of loss or damage, and where this is done in the bona fide effort to fix upon the true value, and is made the basis of a fair and reasonable shipping rate, the parties will be held to the agreed valuation, though the loss shall occur by reason of the carrier's negligence. Conditions under which this apparent limitation upon the more general principle is at times permissible are suggested in *Everett's Case*, *supra*, as follows: "Such agreements are upheld where, the carrier being without knowledge or notice of the true value," and it might be properly added, "without fair and reasonable opportunity for obtaining the same," "the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate." And in *Moulton's Case*, *supra*, the same limitation (more broadly stated) and the reasons for it are given as follows (page 89 of 31 Minn., page 498 of 16 N. W. [47 Am. Rep. 781]): "Yet there is no reason why the contracting parties may not in good faith agree upon the value of the property presented for transportation or fairly liquidate the damages recoverable, in accordance with the supposed value. Such an agreement would not be an abrogation of the requirements of the law, but only an application of the law as it is by the parties themselves to the circumstances of the particular case." And in accord with this suggestion, in *Hutchinson on Carriers*, § 426, the author in treating this subject, after considering the various decisions on the subject, states the rule to be as follows: "For the purpose, therefore, of securing such information, and of establishing a basis upon which to compute his charges, the carrier may, by a contract fairly and honestly entered into with the owner of the goods, stipulate either that the goods are of a certain value, or that their value does not exceed a certain sum, and that, in the event of loss, his liability shall not exceed the sum at which the goods are valued; and, when fairly entered into with a view to placing a bona fide value on the goods, the contract will be conclusive on the owner, and the carrier will not be liable for a greater sum than that at which the goods are valued, although his own misconduct has caused their loss."

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And in section 427: "And it may be stated as the better rule that, where the value agreed upon is so out of harmony with the ordinary values of similar kinds of goods as to indicate that the question of value did not in fact enter into the agreement, and the carrier, under the circumstances, must have known of the discrepancy, the agreement placing a value on the goods will be considered as a mere attempt by the carrier to secure a partial exemption from liability, and of no effect in relieving him from the obligation of responding for their real value where his misconduct has occasioned their loss. So in the absence of fraud or concealment on the part of the owner of the goods whereby the carrier has been misled, the valuation agreed upon, it is said, must be reasonable, regard being had to the real value of the goods; and, if such value be unreasonable, the owner will not be estopped from claiming damages on the basis of their real value."

The apparent limitation pointed out and stated in these citations was applied by this court to a live stock contract, in *Jones v. Railroad*, 148 N. C. 580, 62 S. E. 701, where a quantity of stock was shipped in car load lots, and an average valuation placed on the shipment of \$100 a head. While the average valuation fixed upon now for several years may have been too low according to the price of stock which now prevails, and though the damage done to the particular horse and mule in that case was somewhat in excess of the average agreed upon, the court was of opinion that the discrepancy or disposition was not so marked as to justify it in holding, as a matter of law, that the general average agreed upon in the contract was in violation of the public policy which forms the basis of the general rule. So the agreed valuation in that particular stipulation was upheld. And a like ruling was made at the present term in *Winslow Bros. v. Railroad*, 65 S. E. 965. But, as pointed out in the concurring opinion in *Jones v. Railroad*, *supra*, in order to extend the application of the doctrine suggested to a given shipment, all the conditions indicated must occur, and the ruling and the reason for it are, we think, correctly stated as follows: "In the rare and exceptional cases when a carrier is allowed, on recovery had for breach of contract of carriage of certain classes of goods, to limit the amount of such recovery to a value fixed and predetermined by the contract of shipment, the rule is, I think, correctly stated in *Everett's Case*, as follows: 'Such agreements are upheld where, the carrier being without knowledge or notice of the true value, the parties agree upon a valuation of the particular goods shipped, approximating the average value of ordinary goods of like kind, and make such valuation the basis of a just and reasonable shipping rate.' This rule is particularly applicable to shipments of stock in quantities, and eminently just to both parties to such contracts, af-

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fording to the shipper a fair and reasonable shipping rate, and protecting the carrier from exorbitant and unconscionable recoveries by reason of excessive valuations which it had no opportunity to ascertain or to resist successfully, and for which it has received no adequate compensation. But to permit or uphold such a contract, when the loss arises from negligence, all the conditions suggested must exist. The carrier must be without knowledge or notice of the true value; the valuation must be the fair average valuation of property of like kind, and it must have been made the basis of a fair and reasonable shipping rate"—adding to the statement, as heretofore suggested, the carrier being without notice or knowledge of the true value, or fair and reasonable opportunity for ascertaining the same.

We are not inadvertent to decisions in Massachusetts, to the effect that, where a contract fairly entered into between the carrier and the shipper, fixes the property at a stated value, and makes same the basis of the shipping rate and of adjustment in case of loss or damage, such valuation will be upheld though the injury complained of arose from the carrier's negligence. *Squire v. Railroad*, 98 Mass. 239; *Graves v. Railroad*, 137 Mass. 33, 50 Am. Rep. 282. And we are aware that such a principle was expressly applied by the Supreme Court of the United States in the case of *Hart v. Railway*, 112 U. S. 331-343, 5 Sup. Ct. 151, 28 L. Ed. 717, and that this decision has since been followed by others of our state courts of high repute, as in *Railway v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Railroad v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Johnstone v. Railroad*, 39 S. C. 55, 17 S. E. 512; *Zouch v. Railroad*, 36 W. Va. 524, 15 S. E. 185, 17 L. R. A. 116. In this last case, however, there was a strong dissenting opinion from Lucas, President, to which attention is especially called; and we submit that the general principle, as maintained in these decisions, if it can be upheld at all to the extent stated in the absence of actual fraud, is erroneously applied where, notably as in the Hart Case, the disproportion between the actual and the stipulated value is so pronounced that it is plainly apparent that no effort was made to fix upon the true value of the property shipped, or even to approximate it. Such a ruling on the facts indicated is entirely inconsistent with the doctrine so often and clearly announced by our highest court, and which so generally obtains here and elsewhere, that while a common carrier may by a contract, reasonable in its terms, and founded on a valuable consideration, relieve itself from liability as insurer, it cannot, in the absence of legislative sanction, limit its responsibility for loss or damage resulting from its negligence. *Lockwood's Case*, *supra*; *Solan's Case*, *supra*.

Applying, then, the doctrine as it prevails with us, we are of

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opinion that the restrictive provisions of this contract relied upon by defendant cannot avail for its protection; for, on the facts presented, it appears that the loss arose from defendant's negligence, and that there was no effort by the parties to fix upon a correct valuation of this mare, nor to approximate it, nor was there any place for determining the valuation by reference to the fair average valuation of a particular shipment, sometimes permissible, as in shipment of stock in quantities, but the restriction was inserted according to a valuation in a printed formula, arbitrarily predetermined, without reference to the real value of the animal, nor any effort to ascertain such value. And under numerous and well-considered decisions here and elsewhere a restrictive valuation so arrived at is invalid, where the loss or damage arises from the carrier's negligence.

This was the only question presented in Everett's Case, several times referred to. In that case household goods were shipped at a reduced rate, under a restrictive valuation of \$5 per hundred pounds. The loss attributed to the carrier's negligence as per contract rate amounted to \$30, and in actual value it was \$250. On verdict had, a recovery for the true value was sustained, notwithstanding the restrictive stipulation of the contract, and though it was entered into with the sanction and approval of the Corporation Commission. Speaking to the question in Everett's Case, the court said: "We are satisfied that in this instance both the commission and the railroads were prompted by a laudable motive to afford shippers of small means a lower freight rate. But we cannot allow such consideration in a particular case to change the rule of law that we here uphold. It is one in which the entire public is interested, as well as the individual shipper, established and adhered to for grave and weighty reasons, and necessary for the protection of the great body of shippers. A principle so vital to the public interest should not be altered or weakened because, in a given instance, the motive is good, and the particular result desirable. If this valuation entered as an essential element into the rate here contended for, and the result would enable carriers to evade the law, the rate itself is invalid, and to that extent is not a binding regulation." And after referring to various rulings of other courts on such contracts, the opinion further says: "But in none of these is the valuation relied upon in this bill of lading sanctioned or justified to the extent here claimed for it. So far as we can discover, all of them condemn an effort to limit liability for negligence by a uniform predetermined valuation, arbitrarily fixed and placed in a printed bill of lading without any reference to the actual value of the property, and without any estimate made or attempted to value the property of the particular shipment, more especially where the difference between the stipulated and actual value is so pro-

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nounced that the evident purpose and necessary effect are to practically deny recovery for negligence."

And in Keener's Case, 93 Ga. 108, 21 S. E. 287, Simmons, J., delivering the opinion, said: "Where a shipper enters into an express contract with a common carrier, by which he agrees in consideration of a reduced rate of freight that the carrier shall not be liable for more than a stated sum in case the goods shipped are lost while in the carrier's possession the contract will be upheld as to loss not involving negligence on the part of the carrier, but carriers cannot by any special contract exempt themselves from liability for loss occasioned by their negligence, and this is so as well where the contract provides for partial or limited exemption as where it contemplates total exemption from liability." After stating that under certain circumstances an agreed valuation will be upheld, Judge Simmons continues: "But the principle which relieves the carrier from liability for more than the agreed value does not apply where the real value is merely arbitrary, and fixed without reference to the real value of the goods, and this is understood by the carrier as well as the shipper. In the present case there is no inquiry on the part of the carrier as to the value of the goods, and it is clear that a valuation of \$5 per hundred pounds for wearing apparel and household goods indiscriminately could not have been understood to represent their actual value. The contract in question was simply an attempt to limit the liability of the carrier without regard to the actual value of the property, and it follows from what we have said that it was inoperative for that purpose, if the loss was occasioned by negligence on the part of the defendant. There being no explanation as to how the loss occurred, the presumption is that it resulted from the defendant's negligence."

And in Railroad v. Hall, *supra*, on a contract of this same kind, it was held: "(4) A railway company, in its capacity as a common carrier, may, as a basis for fixing its charges and limiting the amount of its corresponding liability, lawfully make with a shipper a contract of affreightment, embracing an actual and bona fide agreement as to the value of the property to be transported; and in such case the latter, when loss, damage, or destruction occurs, will be bound by the agreed valuation. But a mere general limitation as to the value, expressed in a bill of lading, and amounting to no more than an arbitrary pre-adjustment of the measure of damages, will not, though the shipper assent in writing to the terms of the document, serve to exempt a negligent carrier from liability for the true value."

And these and other cases of like import are in accord with the doctrine approved and sustained by numerous and well-considered decisions of the Supreme Court of the United States, notably in the case of Calderon v. Steamship Co., 170 U. S.

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272, 18 Sup. Ct. 588, 42 L. Ed. 1033. Calderon's Case was an action involving a construction of what is known as the "Harter Act," a statute passed by Congress in February, 1893, chiefly for regulating the liability of carriers of freight by water (Act. Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). Section 1 of the act endeavoring to preserve the common-law liability of carriers, contained a provision prohibiting such carriers from making stipulations against liability for loss or damage arising from their negligence in certain features of their contract of shipment. In the contract in question there was a provision as follows: "It is also mutually agreed that the carrier shall not be liable for gold, etc., works of art, etc., or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made." In action for loss attributable to the carrier's negligence the restrictive stipulation of the contract was held void as against the provision of the act, such provision being expressive of the public policy obtaining here; and Associate Justice Brown, in delivering the opinion, among other things, said: "Under this interpretation there is a clear attempt on the part of the carrier to exonerate itself from all responsibility for goods exceeding the value of \$100 per package. Such exemption is not only prohibited by the Harter act, but is held to be invalid in a series of cases in this court, culminating in Chicago, Milwaukee, etc., Railway v. Solan, 169 U. S. 133, 135 [18 Sup. Ct. 289, 290, 42 L. Ed. 688], wherein it was said that 'any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility for loss or damage arising from the negligence of himself or servants is void as against public policy, as attempting to put off the essential duties resting upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principle upon which the law of common carriers was established.' The difficulty is not removed by the fact that the carrier may render itself liable for these goods if 'bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.' This would enable the carrier to do, as was done in this case—give a bill of lading in which no value was expressed, under which it would not be liable at all for the safe transportation and proper delivery of the property. This would be in direct contravention of the Harter act. Indeed, we understand it to be practically conceded that under the construction we have given to this clause of the contract the exemption would be unreasonable and invalid."

It is contended that to allow plaintiff to recover damages estimated on a valuation greater than that agreed upon, when such valuation was made the basis of a reduced shipping rate, would

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be to sanction and uphold a fraud; but we do not think that any such position is open to defendant in this case. There is a doctrine, well recognized, that if a shipper is guilty of positive fraud in representing the character and value of goods shipped, reasonably relied upon by the carrier, recovery for the actual value will be denied; but no such principle is applicable here. The plaintiff, the shipper, bought the mare in Louisiana, and, so far as appears, was not present when the contract of shipment was entered into, and while he no doubt would be bound to the valid stipulations of his agent, there is no allegation or suggestion of positive fraud or misrepresentation on the part of either of them; no such issue was raised by the pleadings, and no such evidence offered, and counsel for defendant, on being questioned in this respect on the argument, frankly admitted that defendant had no such evidence at the trial, but stated that he had reason to believe that such evidence could be procured, and would be forthcoming if opportunity were given by another trial. The fact that a single animal was shipped from New Orleans to Waynesville at a cost of \$56.50 might well be considered as affording fair notice that \$75 was no correct valuation, and it is perfectly apparent, as heretofore stated, that the mare was shipped on an arbitrary valuation under a printed formula, and that no effort was made to fix upon a correct value, and no statement or inquiry was made by either side on the subject.

Speaking to a like position urged in Everett's Case, so often quoted from, the court said: "It is not claimed here that the carrier was misled or deceived in any way as to the kind or value of these goods. There is neither allegation nor issue addressed to any such question; and, as we understand it, the defendants did not intend or desire to raise it. Some of the goods lost were perhaps not correctly classified as household goods, but the amount properly described as household goods was more than sufficient to justify the verdict. As a matter of fact, no inquiry was made about the value of the goods, and no statement made concerning them one way or the other. The agent just classified them at the established rate and uniform valuation provided for by the regulation and printed in the bill of lading, and no effort was made to estimate or put any value on the goods of this particular shipment."

Nor do we think that the doctrine of estoppel as applied in many of the cases relied upon by defendant should avail defendant here. Some of these decisions could be reconciled on the ground that, if the disproportion between the actual and the stipulated values is so great as to give clear indication that there was no effort made to fix upon or approximate the true value, as in this case, it could be properly held that such a contract would be neither fair nor reasonable; but in many of them we think the doctrine of estoppel is too broadly stated. For if a

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contract like that one we are considering is such as to deny substantial recovery for loss occasioned by the carrier's negligence, it is void as against public policy, and it is not permissible to uphold such an agreement on the principle of estoppel. Such a position carried to its logical conclusion would enable individuals, as to their personal contracts and conduct towards each other, to set at naught both the public statutes and police regulations of the state. Accordingly we find that, except in cases of positive fraud, which in whole or in part may operate to set aside the contract relation, the doctrine of estoppel as ordinarily applied is only available in aid or extension of valid contracts. Bigelow on Estoppel (5th Ed.) citing *Brightman v. Hicks*, 108 Mass. 246; *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393; *Shor-man v. Eakin*, 47 Ark. 351, 1 S. W. 559; *Klenk v. Knobbe*, 37 Ark. 304—authorities which fully support the text.

It may be well to note that the feature of the restrictive stipulation which makes the value at the place of shipment the basis for adjustment in case of loss or damage is not presented for consideration, as the plaintiff's counsel admitted on the argument that the value at the place of shipment should constitute such basis, and the court directed the jury to accept and act upon such valuation in considering the case. Here, as in other features of these restrictive contracts, the cases are in conflict (*Hutchinson on Carriers*, § 430); the author stating, however, that the weight of authorities favors the validity of such a stipulation, and the writer, speaking for himself, is inclined to the opinion that such a provision is a reasonable one, and should be upheld, affording, as it does, data for adjustment ordinarily more reliable and more easily obtained.

On the whole matter we are of opinion, and so hold, that, the damage done having been occasioned by the carrier's negligence, the defendant is responsible for the actual loss as ascertained by the verdict, and that the stipulations of the agreement by which defendant seeks to restrict the value as a basis for adjustment at \$75 is in contravention of public policy and void. We note, however, that the court instructed the jury in effect that they could add to the damage done the mare the \$56.50 paid for transportation and feed, and it is apparent that the jury have followed the instruction, and added this amount to their estimate. As the mare was received at Waynesville, and the animal as valued at that point is owned and possessed by plaintiff, it would seem that the charges for getting her to Waynesville is included in such value, for it would cost as much to transport the animal in the one case as the other. The verdict will therefore be modified by reducing same by this \$56.50, and, so reduced, the verdict and judgment will be affirmed.

Modified and affirmed.

PARKER BUGGY CORPORATION *v.* ATLANTIC COAST LINE R. CO.
et al.

(Supreme Court of North Carolina, March 9, 1910.)

[67 S. E. Rep. 251.]

Carriers—Delay in Shipment—Right of Action.—Where goods are shipped under circumstances importing absolute ownership by the consignee of the goods and of all interest in the contract of shipment, and its proper performance, the right to recover damages for delay in shipment, or negligent injury to the goods during transportation, rests in the consignee alone.

Carriers—Delay in Shipment—Right of Action.*—Where a seller ships goods on an ordinary and open bill of lading, the buyer designated as the consignee in the bill of lading is *prima facie* the owner of the goods, and, in the absence of evidence tending to the contrary, the consignee alone can sue for delay in transportation.

Appeal from Superior Court, Craven County; Guion, Judge.

Action by the Parker Buggy Corporation against the Atlantic Coast Line Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

There was evidence tending to show that the goods were shipped by plaintiff, manufacturers of buggies, on an open and ordinary bill of lading to one J. M. Arnold, consignee, at New Bern, N. C., and that there was wrongful delay in the shipment and negligent injury done the goods imputable to the defendant the Atlantic Coast Line Railroad Company. At the close of plaintiff's evidence, and at the close of the entire evidence, there was a motion to nonsuit under the Hinsdale act. Both motions denied, and exceptions duly made and entered. The jury rendered the following verdict:

"(1) Has the plaintiff been damaged by the negligence of the defendant Atlantic Coast Line Railroad Company, as alleged? Answer: Yes.

"(2) If so, what damage has he sustained by reason of wrongful delay in delivering such vehicles, as alleged? Answer: \$100.

"(3) If so, what damage, if any, has he sustained by reason of the negligent conveyance of said vehicles while in transit over defendant Atlantic Coast Line Railroad Company's line? Answer: \$200."

*For the authorities in this series on the subject of the ownership of goods shipped by the seller to the buyer, see foot-note of *Norfolk Hardwood Co. v. New York Cent., etc., R. Co.* (Mass.), 33 R. R. R. 168, 56 Am. & Eng. R. Cas., N. S., 168.

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Judgment on the verdict for plaintiff, and defendants excepted and appealed.

Rouse & Land, for appellants.

R. A. Nunn, for appellee.

HOKE, J. The decisions of this state uphold the position that where goods are shipped with a common carrier under circumstances importing absolute ownership of same on the part of the consignee, and of all pecuniary and beneficial interest in the contract of shipment and its proper performance, the right to recover damages for delay in the shipment or negligent injury to the goods during their transportation rests in the consignee, and he alone can maintain an action for such wrong.

Our authorities are also to the effect that, where a vendor ships goods to a vendee on an ordinary and open bill of lading, the purchaser designated as the consignee in such bill of lading is *prima facie* the owner of the goods, and of all interest in the contract of shipment; and, in the absence of any evidence tending to qualify or restrict the conditions stated on injury wrongfully suffered, the consignee, and not the consignor, is the proper party to institute and maintain the suit. The principle indicated has of late been more frequently recognized and applied with us in actions against common carriers under the penalty statutes of the state in defining who is the "party aggrieved," designated in most of them as the person who may bring the suit, as in *Stone v. Railroad*, 144 N. C. 220, 56 S. E. 932; but they are made to rest on the principle that where a vendor ships goods to a purchaser with a common carrier designated by such purchaser, or with a common carrier whose lines afford the usual route and ordinary method of shipment, and on a bill of lading of the kind described, the carrier is considered the agent of the vendee, and on delivery to such carrier the title passes to such vendee, and thereafter, nothing else appearing, he is the real party interested in the proper performance of the contract. *Hunter v. Randolph*, 128 N. C. 91, 38 S. E. 288. And in *Gaskin v. Railroad* (at last term) 151 N. C. 18, 65 S. E. 518, the doctrine was applied to a case directly involving the right of a consignor to maintain a suit for damages, when it appeared, without more, that the goods had been shipped to a purchaser on an open bill of lading; and it was held that the action would not lie.

We are aware that other courts, eminent for their ability and learning, hold, as we interpret their opinions, that in actions on the contract of carriage both the consignor and consignee may ordinarily sue, and, if it is disclosed on the trial that the consignee is the sole owner of the goods, and of all interest affected by the wrong, that the recovery will be to his use. Mr. Hutchinson in his valuable and accurate work on Carriers gives an interesting account of some of the different decisions on the sub-

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ject (Hutchinson [3d Ed.] §§ 1304-07, *et seq.* [original sections 720 *et seq.*]), and adds the weight of his own opinion in favor of this view. Sections 1312, 1313. The author, however, states that the contrary position is maintained by courts of recognized authority, citing *Potter v. Lansing*, 1 Johns. (N. Y.) 215, 3 Am. Dec. 310; *Meigs v. Hagan et al.* (D. C.) 86 Fed. 926; *Everett v. Saltus*, 15 Wend. (N. Y.) 474; *McLaughlin v. Mastin*, 12 Colo. App. 268, 55 Pac. 195; *Railroad v. Metcalf*, 50 Neb. 452, 69 N. W. 961, and other authorities in support of this statement. While we are deeply sensible of the great consideration due, and which should always be given, to courts and text-writers of the character referred to, we have concluded to adhere to our own position on the question presented, as grounded on repeated adjudications with us, as more in keeping with the spirit and letter of our law, which requires that actions shall be prosecuted in the name of the real party in interest; and as presenting perhaps fewer complications than may often arise in the administration and enforcement of the contrary ruling.

While on the facts presented this is the position which *prima facie* obtains with us, it is open to the consignor to sustain his right to sue on the contract by evidence relevant and sufficient tending to qualify the conditions indicated. Thus he may show that the goods were shipped under stipulations that in effect retained the title thereto, or some interest therein, in the consignor, as in *Mfg. Co. v. Railroad*, 149 N. C. 216, 62 S. E. 1091, or that the goods were shipped on consignment, or under other circumstances showing that the consignor had a pecuniary and beneficial interest in the proper performance of the contract of shipment, as in *Summers' Case*, 138 N. C. 295, 50 S. E. 714, or in *Rollins' Case*, 146 N. C. 153, 59 S. E. 671, or *Cardwell's Case*, 146 N. C. 218, 59 S. E. 673, or it may be shown that, owing to the carrier's default, the parties have rescinded the contract and restored the title to the consignor before action brought, as in *Railroad v. Commercial Guano Co.*, 103 Ga. 590, 30 S. E. 555; this case being digested in part as follows: "(1) Where a consignee of freight refuses to receive goods on account of damages done to them in the hands of the common carrier, and the goods are subsequently thrown back on the hands of the consignor, the latter has a right to bring an action for such damages against the carrier." And other qualifying conditions might be suggested. But wherever it appears, as stated, that a vendor has shipped goods to a purchaser on an open bill of lading by a carrier selected by the purchaser or by a carrier whose lines afford the usual route and ordinary methods of shipment, in which case a selection by the purchaser may be presumed, and there is no fact in evidence which tends to restrict or qualify the interest of the purchaser designated as consignee in the bill, in such case, and under our decisions, the consignee alone has a right of action for wrongful

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delay in shipment or negligent injury to the goods during transportation on the part of the carrier. And so it is here. The testimony set out in the case on appeal discloses that the goods were shipped by plaintiff to J. M. Arnold, as consignee and purchaser, at New Bern, N. C., under an open bill of lading, and it further appears that the plaintiff, consignor, has never in any way rescinded or abandoned the contract or resumed possession of the goods, but at the time of action commenced, and at the time of trial, the same were in a railroad warehouse in New Bern, N. C., and plaintiff's president and general manager testified that the plaintiff still held the consignee responsible on the contract as the matter now appears of bargain and sale.

On these facts we are of opinion, and so hold, that the defendant's motion to nonsuit should have been sustained, and it is so ordered.

Reversed.

ST. LOUIS, I. M. & S. RY. CO. v. WELLS.

(Supreme Court of Arkansas, Jan. 10, 1910.)

[124 S. W. Rep. 524.]

Master and Servant—Injuries to Servant—Assumed Risk.—Where a fireman of six months' experience and average intelligence knew that about one-third of the engines were equipped with screens on the lubricator feed glasses, which were immediately in front of him on the boiler, and there was no defect or anything inherently dangerous in the glass, except that it might occasionally break, as any other implement or tool might, he assumed the risk of injury from the breaking of the glass.

Master and Servant—Master's Duty—Warning Servant—Necessity of Instruction.*—A master need not warn an inexperienced servant of possible dangers in the performance of his duties, where experience and instruction are not necessary to enable him to do his work with safety.

Master and Servant—Injuries to Servant—Proximate Cause.—Where a lubricator feed glass on a locomotive boiler was not inherently dangerous, so that a warning to a fireman that it might possibly break would not have obviated the danger of its breaking, failure to warn him that the glass might sometimes break was not the proximate cause of his injury from its breaking.

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Action by W. H. Wells against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and case dismissed.

*See note at end of case.

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E. B. Kinsworthy and Lewis Rhoton, for appellant.*J. H. Harrod*, for appellee.

HART, J. This is an appeal by the St. Louis, Iron Mountain & Southern Railroad Company from a judgment rendered against it in the Lonoke circuit court in favor of W. H. Wells for physical injuries received by him on account of the alleged negligence of the railroad company in not screening or shielding the feed glass of the lubricator on one of its engines, whereby his right eye was destroyed by the bursting of said feed glass. The statement of facts is substantially as follows:

W. H. Wells, the plaintiff, was 22 years of age. Until about 20 years old, he worked on a farm. He then worked for a railroad company in the capacity of car repairer and engine watchman. About six months before the injury occurred, he was employed by the defendant company as fireman, in which capacity he worked until the time of the injury, of which he complains. His usual run as fireman was on the Central Division between Little Rock and Van Buren in the state of Arkansas. He was directed at the beginning of each run to fill the lubricator on the engine, and did so unless the engineer arrived first and filled it. He had no other duties to perform in connection with the lubricator. The oil feeds through a glass tube, and the lubricator is right above the boiler in plain view of the engineer and fireman when on their seats. The engines are equipped with screens and wire shields to the feed glass when they leave the shops, but these are soon taken off by the engineer so that he can better watch the oil feed through the glass to the cylinder. On the road in question the shields and screens had been removed from as many as two-thirds of the engines. The plaintiff first saw the engine in question on February 18, 1908, when he left Little Rock on it as fireman. His run was to McGehee in this state. The next morning at McGehee, when the plaintiff climbed upon the engine, the engineer told him that he had already filled the lubricator. The engineer went back to the tank to see about the water. While he was gone, the plaintiff noticed some steam escaping from the bottom of the feed glass. He says that he thought this might be dangerous and decided to shut off the steam. He went forward toward the lubricator and started to take hold of the condenser, and about that time the glass burst. A piece of the glass flew in his eye and injured it so severely that it had to be removed.

The above statement of facts is uncontradicted, and thus raises the issue of whether the court erred in not giving a peremptory instruction in favor of the defendant.

The plaintiff was a man of average intelligence. He had been employed by the defendant as fireman for six months. He knew that only one-third of its engines were equipped with shields or

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screens on the feed glass of their lubricators. The lubricators were on the boiler immediately in front of him, where but to look would be to know whether or not the feed glass was guarded by shield or screen. Plaintiff said that he had never known one of the feed glasses to break before, but any one with his experience must have known that glass will sometimes break.

There was nothing inherently dangerous about the use of the feed glass. The only danger was that which might arise from the occasional breaking of it just as any other tool or implement might break. It is not contended that there was any defect in it. We think, under the undisputed facts, it was one of the risks incident to the service which the plaintiff assumed when he entered the employment of defendant as fireman on one of its locomotives. *St. L., I. M. & S. Ry. Co. v. Corman*, 122 S. W. 116; *Louisiana & Arkansas Railway Company v. Miles*, 82 Ark. 534, 103 S. W. 158, 11 L. R. A. (N. S.) 720.

Besides, "it is not the duty of a master to warn an inexperienced servant of the dangers liable to be encountered by him in the performance of his duties where experience and instruction are not necessary to enable him to do with safety the work he is employed or required to perform." *Ford v. Bodcaw Lumber Company*, 73 Ark., at page 55, 83 S. W. 346.

The only duty plaintiff had to perform in connection with the lubricator was to fill it when directed by the engineer. There was nothing inherently dangerous in working near it. If the plaintiff had been warned that the feed glass might occasionally burst, it could not have lessened the likelihood of explosion in this case. Hence the mere fact that he was not told that the feed glass might sometimes break in no wise contributed to cause his injury. *Brands v. St. Louis Car Co.*, 213 Mo. 698, 112 S. W. 511, 18 L. R. A. (N. S.) 701.

Therefore we conclude that the court erred in not directing the jury to return a verdict for the defendant.

For that error, the judgment must be reversed, and the cause dismissed.

NOTE

MASTER'S DUTY TO WARN AND INSTRUCT HIS SERVANT.

1. Obvious Dangers, 641.
2. Latent Dangers, 647.
3. Latent Dangers Not Discoverable by Exercise of Ordinary Care, 654.
4. Changes in Appliances or Work Place, 655.
5. Same—Rule Applies to Latent Hazards Only, 658.
6. Work Rendered Hazardous by Extraneous Cause, 659.
7. Work Not within Scope of Employment, 659.
8. Directed to Perform Work Not Within Scope of Employment, 660.
9. Work Place Rendered Unsafe by Other Work, 661.
10. Experienced Employees, 665.

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11. Inexperienced Employees, 669.
12. Same—Obvious Dangers, 675.
13. Minors, 675.
14. Total Incapacity to Appreciate Dangers, 677.
15. Perspicuity, 677.
16. Same—Characteristics of Employee, 679.
17. Information Acquired by Employee from Other Source, 680.

Cross Reference to Preceding Authorities in This Series.

Duty of Master to Warn and Instruct His Employees.—See second foot-note of *Arkansas Midland Ry. Co. v. Worden* (Ark.), 32 R. R. R. 106, 55 Am. & Eng. R. Cas., N. S., 106; note, 4 R. R. R. 455, 27 Am. & Eng. R. Cas., N. S., 455; note, 19 Am. & Eng. R. Cas., N. S., 6; third head-note of *St. Louis, etc., Ry. Co. v. Jamison* (Ark.), 31 R. R. R. 677, 54 Am. & Eng. R. Cas., N. S., 677; first head-note of *Arkansas Cent. R. Co. v. Workman* (Ark.), 31 R. R. R. 300, 54 Am. & Eng. R. Cas., N. S., 300.

Duty of Railroad Companies to Prescribe Rules for the Protection of Their Employees.—See extensive note, 5 R. R. R. 441, 28 Am. & Eng. R. Cas., N. S., 441; first foot-note of *Yeates v. Illinois Cent. R. Co.* (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65.

1. OBVIOUS DANGERS.

An employee is under no legal obligation to instruct or warn his employees in regard to the dangers of the service which would be obvious to persons of ordinary observation and understanding.

United States.—*Fortin v. Manville Co.*, 128 Fed. Rep. 642; *Garnett v. Phoenix Bridge Co.* (C. C.), 98 Fed. Rep. 192; *Keats v. Nat. Heeling Mach. Co.*, 13 C. C. A. 221, 65 Fed. Rep. 940; *Kohn v. McNulta*, 147 U. S. 238, 37 L. Ed. 158; *National Biscuit Co. v. Nolan* (C. C. A.), 138 Fed. Rep. 6; *Thompson v. Chicago, etc., R. Co.*, 14 Fed. Rep. 564.

Alabama.—*East Tennessee, etc., R. Co. v. Turnaville*, 97 Ala. 122, 12 So. 63; *Louisville, etc., R. Co. v. Baldwin*, 85 Ala. 619, 5 So. 311; *Louisville, etc., R. Co. v. Bouldin*, 121 Ala. 197, 25 So. 903; *Louisville, etc., R. Co. v. Boland*, 96 Ala. 626, 11 So. 667; *Melton v. Jackson Lumber Co.*, 133 Ala. 580; *North Birmingham St. R. Co. v. Wright*, 130 Ala. 419; *Worthington v. Goforth* (Ala.), 26 So. 531.

Connecticut.—*Dickenson v. Vernon*, 77 Conn. 537, 60 Atl. 270; *Morris v. Winchester Repeating Arms Co.*, 73 Conn. 680, 49 Atl. 180.

Georgia.—*Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *East, etc., R. Co. v. Sims*, 80 Ga. 807, 6 S. E. 595; *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674.

Illinois.—*American Malting Co. v. Lelivelt*, 101 Ill. App. 320; *anderberg v. Chicago, etc., R. Co.*, 98 Ill. App. 207; *Brown Hoisting, etc., Mach. Co. v. Bennett*, 96 Ill. App. 514; *Chicago Edison Co. v. Davis*, 93 Ill. App. 284; *Chicago, etc., R. Co. v. Bell*, 209 Ill. 25, 70

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N. E. 754; Chicago, etc., R. Co. *v.* Pettigrew, 82 Ill. App. 33; Conel-son *v.* Craver, 80 Ill. App. 99; Consolidated Coal Co. *v.* Scheller, 42 Ill. App. 619; Electrical Installation Co. *v.* Kelly, 110 Ill. App. 512; Illinois Cent. R. Co. *v.* Brown, 107 Ill. App. 334; Indianapolis, etc., R. Co. *v.* Flanigan, 77 Ill. 365; Iroquois Furnace Co. *v.* McCrea, 91 Ill. App. 337; Marsden Co. *v.* Johnson, 89 Ill. App. 100; Mobile, etc., R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416; Reynolds *v.* Grace, 115 Ill. App. 473; Ryan *v.* Armour, 166 Ill. 568, 47 N. E. 60; United States Rolling Stock Co. *v.* Wilder, 116 Ill. 100, 5 N. E. 92.

Indiana.—Big Creek Stone Co. *v.* Wolf, 138 Ind. 496, 38 N. E. 52; Atlas Engine Works *v.* Randall, 100 Ind. 293; Corning Steel Co. *v.* Pohlplatz, 29 Ind. App. 33.

Iowa.—Campbell *v.* Illinois Cent. R. Co., 124 Iowa 302, 100 N. W. 30; McCarthy *v.* Mulgrew, 107 Iowa 76, 77 N. W. 527; Newburg *v.* Getchel, etc., Mfg. Co., 100 Iowa 441, 69 N. W. 743; Patton *v.* Central Iowa R. Co., 73 Iowa 306, 35 N. W. 149; Wilder *v.* Great Western Central Co. (Iowa), 104 N. W. 434; Yeager *v.* Burlington, etc., R. Co., 93 Iowa 1, 61 N. W. 215.

Kentucky.—Jones *v.* Louisville, etc., R. Co., 95 Ky. 576, 26 S. W. 500; Louisville, etc., R. Co. *v.* Law, 14 Ky. L. Rep. 850, 21 S. W. 648; McCormick Harvesting Machine Co. *v.* Liter, 23 Ky. Law Rep. 2154, 66 S. W. 761.

Maine.—Bryant *v.* Great Northern Paper Co., 100 Me. 171, 60 Atl. 767; Cunningham *v.* Bath Iron Works, 92 Me. 501, 43 Atl. 106; Wormell *v.* Maine Cent. R. Co., 79 Me. 397, 10 Atl. 49.

Maryland.—Hettchen *v.* Chipman, 87 Md. 729, 41 Atl. 65.

Massachusetts.—Buston *v.* Harvard Brewing Co., 183 Mass. 438, 67 N. E. 356; Campbell *v.* Dearborn, 175 Mass. 183, 55 N. E. 1042; Carey *v.* Boston, etc., R. Co., 158 Mass. 228, 33 N. E. 512; Cheney *v.* Middlesex Co., 161 Mass. 296, 37 N. E. 175; Chisholm *v.* Donovan, 188 Mass. 378, 74 N. E. 652; Chmiel *v.* Thorndike Co., 182 Mass. 112, 65 N. E. 47; Conner *v.* Draper Co., 182 Mass. 184, 65 N. E. 39; Coullard *v.* Tecumseh Mills, 151 Mass. 85, 23 N. E. 731; Crowley *v.* Pacific Mills, 148 Mass. 228, 19 N. E. 344; Daniels *v.* New England Cotton Yarn Co., 188 Mass. 260, 74 N. E. 332; De Souza *v.* Strafford Mills, 155 Mass. 476, 30 N. E. 81; Demers *v.* Marshall, 178 Mass. 9, 59 N. E. 454; Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654; Ford *v.* Mount Tom, etc., Co., 172 Mass. 544, 52 N. E. 1065; Gavin *v.* Fall River, etc., Co., 185 Mass. 78, 69 N. E. 1055; Gaudet *v.* Stansfield, 182 Mass. 451, 65 N. E. 850; Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. 623; Gleason *v.* Smith, 172 Mass. 50, 51 N. E. 460; Harrington *v.* Union Cotton Mfg. Co., 182 Mass. 566, 66 N. E. 414; Hofnauer *v.* White Co., 186 Mass. 47, 70 N. E. 1038; Hoard *v.* Blackstone Mfg. Co., 177 Mass. 69, 58 N. E. 180; Ladd *v.* Brockton St. R. Co., 180 Mass. 454, 62 N. E. 730; Lemoine *v.* Aldrich, 177 Mass. 89, 58 N. E. 178; Lothorp *v.* Fitchburg R. Co., 150 Mass. 423, 23 N. E. 227; Lowcock *v.* Franklin Paper Co., 169 Mass. 313, 47 N. E. 1000; Meehan *v.* Holycke St. R. Co., 186 Mass. 511, 72 N. E. 61; Nye *v.* Dutton, 187 Mass. 549, 73

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N. E. 654; *O'Keeffe v. Squire Co.*, 188 Mass. 210, 74 N. E. 340; *Perry v. Smith*, 156 Mass. 340, 31 N. E. 9; *Pratt v. Prouty*, 153 Mass. 333, 26 N. E. 1002; *Richstain v. Washington Mills Co.*, 157 Mass. 538, 32 N. E. 908; *Robinska v. Mills*, 174 Mass. 432, 54 N. E. 873; *Ruchinsky v. French*, 168 Mass. 68, 46 N. E. 417; *Shine v. Cocheco Mfg. Co.*, 173 Mass. 558, 54 N. E. 245; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476, 59 N. E. 73; *Stuart v. West End. St. R. Co.*, 163 Mass. 391, 40 N. E. 180; *Sullivan v. Simplex Elec. Co.*, 178 Mass. 35, 59 N. E. 645; *Ward v. Connor*, 182 Mass. 170, 64 N. E. 968; *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 47 N. E. 506.

Michigan.—*Berlin v. Merston & Co.*, 132 Mich. 183, 93 N. W. 248; *Davis v. Port Huron Engine, etc., Co.*, 126 Mich. 429, 85 N. W. 1125; *Erickson v. Cummer Mfg. Co. (Mich.)*, 103 N. W. 828; *Fenlon v. Duluth, etc., R. Co.*, 108 Mich. 284, 66 N. W. 51; *Findlay v. Russel, etc., Co.*, 108 Mich. 286, 66 N. W. 50; *Harrison v. Detroit, etc., R. Co.*, 137 Mich. 78, 100 N. W. 451; *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 253, 16 N. W. 634; *Hathaway v. Washington Mill Co.*, 139 Mich. 708, 103 N. W. 164; *Mackin v. Alaska Refrigerator Co.*, 100 Mich. 276, 58 N. W. 999; *Michigan Cent. R. Co. v. Smithsonian*, 45 Mich. 212, 7 N. W. 791; *Mushinski v. Vincent*, 135 Mich. 26, 97 N. W. 43; *Palmer v. Harrison*, 57 Mich. 182, 23 N. E. 624; *Willis v. Besser-Churchill Co.*, 126 Mich. 659, 86 N. W. 133.

Minnesota.—*Berger v. St. Paul, etc., R. Co.*, 39 Minn. 78, 38 N. W. 814; *Boyer v. Eastern R. Co.*, 87 Minn. 367; *Jensen v. Regan*, 92 Minn. 323.

Missouri.—*Herbert v. Mound Hill Boot, etc., Co.*, 99 Mo. App. 305; *Mueller v. La Prelle Shoe Co.*, 109 Mo. App. 506; *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220, 20 S. W. 436; *Rodney v. St. Louis, etc., R. Co.*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; *Rogers v. Meryerson Printing Co.*, 103 Mo. App. 683; *Wolter v. Harrison Wire Co.*, 14 Mo. App. 592.

Nebraska.—*Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656, 75 N. W. 1097.

New Hampshire.—*Collins v. Laconia Car Co.*, 68 N. H. 196, 38 Atl. 1047; *Henderson v. Williams*, 66 N. H. 405, 23 Atl. 365; *O'Hare v. Cocheco Mfg. Co.*, 71 N. H. 104; *Thomas v. Exeter, etc., St. R. Co. (N. H.)*, 58 Atl. 838.

New Jersey.—*Carrington v. Mueller*, 65 N. J. L. 244; *Hesse v. National Casket Co.*, 66 N. J. L. 352; *Tompkins v. Maine Engine, etc., Co.*, 70 N. J. L. 330.

New York.—*Bohn v. Havemeyer*, 114 N. Y. 296; *Burke v. Thompson Meter Co.*, 135 N. Y. 651; *Cmielewski v. Mollenhauer Sugar Refining Co.*, 11 N. Y. App. Div. 111, 42 N. Y. S. 936; *Dillon v. National Coal Tar Co.*, 181 N. Y. 215; *Gaertner v. Schmitt*, 21 N. Y. App. Div. 403, 47 N. Y. S. 521; *Gordon v. Reynolds Card Mfg. Co.*, 47 Hun (N. Y.) 278; *Grown v. Orr*, 140 N. Y. 450; *Koren v. National Conduit, etc., Co.*, 82 N. Y. App. Div. 527; *McCampbell v. Cunard Steamship Co.*, 13 N. Y. Supp. 228; *McCue v. National Starch Mfg. Co.*, 142 N.

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Y. 106; *Maltbie v. Belden*, 167 N. Y. 307; *Monzi v. Friedline*, 33 N. Y. App. Div. 217, 53 N. Y. S. 482; *Murphy v. Mairs*, 6 N. Y. St. Rep. 42; *O'Hare v. Heeler*, 22 N. Y. App. Div. 191, 48 N. Y. S. 376; *Oszoscil v. Eagle Pencil Co.*, 57 N. Y. Super. Ct. 217, 6 N. Y. S. 501; *Vilas v. Vanderbilt*, 44 N. Y. S. 267, 20 Misc. Rep. 51; *Vykess v. Duncan Co.*, 88 N. Y. App. Div. 384; *Wahl v. Chatillon*, 56 N. Y. App. Div. 554, 65 N. Y. S. 504; *Wendling v. Bainbridge*, 6 N. Y. St. 21; *White v. Witteman Lithographic Co.*, 131 N. Y. 631.

North Carolina.—*Kiser v. Hot Springs Barytes Co.*, 131 N. Car. 595.

Ohio.—*Connell v. Miller, etc.*, Mfg. Co., 10 Ohio Dec. 129; *Diamond Rubber Co. v. McClurg*, 26 Ohio Civ. Ct. 481; *Wainright v. Lake Shore, etc.*, R. Co., 11 Ohio Civ. Dec. 530.

Oregon.—*Gibson v. Oregon Short Line R. Co.*, 23 Ore. 493, 32 Pac. 295.

Pennsylvania.—*Baldwin v. Urner*, 206 Pa. St. 459, 56 Atl. 38; *Belows v. Pennsylvania, etc.*, R. Co., 157 Pa. St. 51, 27 Atl. 685; *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; *Cracraft v. Bessemer Limestone Co.*, 210 Pa. St. 15, 59 Atl. 432; *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625, 47 Atl. 846; *Delaware River Iron, etc., Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 63; *Fricker v. Penn. Bridge Co.*, 197 Pa. St. 442, 47 Atl. 354; *Fulford v. Lehigh Valley R. Co.*, 185 Pa. St. 329; *Gallagher v. Snellenburg*, 210 Pa. St. 642, 60 Atl. 307; *McGinnis v. Kerr*, 204 Pa. St. 615, 54 Atl. 479; *O'Keefe v. Thorn (Pa.)*, 16 Atl. 737.

Rhode Island.—*Baumler v. Narragansett Brewing Co.*, 23 R. I. 430; *Durell v. Hartwell*, 26 R. I. 125; *Frangiose v. Horton*, 26 R. I. 291; *Parline v. Bishop Co.*, 25 R. I. 298; *Pintorelle v. Horton*, 22 R. I. 374; *Russell v. Riverside Worsted Mills*, 24 R. I. 591.

South Carolina.—*Martin v. Royster Guano Co.*, 72 S. Car. 237, 51 S. E. 680; *Owings v. Moneynick Oil Mill*, 55 S. Car. 483, 33 S. E. 511; *Simms v. South Carolina R. Co.*, 26 S. Car. 490, 2 S. E. 486.

Tennessee.—*Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53.

Texas.—*Gulf, etc.*, R. Co. *v. Williams*, 72 Tex. 159, 12 S. W. 172; *International, etc.*, R. Co. *v. McCarthy*, 64 Tex. 632; *Ladonia Cotton Oil Co. v. Shaw*, 27 Tex. Civ. App. 65, 65 S. W. 693; *Moore v. Missouri, etc.*, R. Co., 30 Tex. Civ. App. 266, 69 S. W. 997; *Parish v. Missouri, etc.*, R. Co. (Tex. Civ. App.), 76 S. W. 234; *San Antonio Gas Co. v. Robertson*, 93 Tex. 503, 56 S. W. 323; *St. Louis, etc.*, R. Co. *v. Austin* (Tex. Civ. App.), 72 S. W. 212; *Seery v. Gulf, etc.*, R. Co., 34 Tex. Civ. App. 89, 77 S. W. 950; *Texas, etc.*, R. Co. *v. Sherman* (Tex. Civ. App.), 87 S. W. 887; *Tucker v. National Loan, etc., Co.*, 35 Tex. Civ. App. 474, 80 S. W. 879; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 226.

Virginia.—*Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

Washington.—*Watts v. Hart*, 7 Wash. 178, 34 Pac. 423, 771; *Woods*

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v. Northern Pac. R. Co., 36 Wash. 658, 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365, 79 Pac. 309.

Wisconsin.—*Dahlke v. Illinois Steel Co.*, 100 Wis. 431, 76 S. W. 382; *Groth v. Thoman*, 110 Wis. 488, 86 N. W. 178; *Johnson v. Ashland Water Co.*, 77 Wis. 51, 45 N. W. 807; *Sladky v. Martinette Lumber Co.*, 107 Wis. 250, 83 N. W. 514; *Wagner v. Piano Mfg. Co.*, 110 Wis. 48, 85 N. W. 643.

Machine Requiring Little Skill or Practice to Operate.—If the implement or machine be one the danger of using which is apparent, and which does not result from any latent defect, the machine itself being in general use, easy to understand, and requiring little skill or practice to operate, an employee injured in operating it will not be heard to complain that he was not informed of its construction or the danger of using it. *International, etc., R. Co. v. McCarthy*, 64 Tex. 632.

How to Board Ore Car Drawn by Mule.—In *Richards v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 21 R. R. R. 36, 44 Am. & Eng. R. Cas., N. S., 36, 41 So. 288, it is held that the master is under no duty to instruct an employee, 19 years old, engaged to drive an ore car drawn by a mule, how to board the car so as to avoid slipping because of mud which was on it, the nature of which he knew.

Chargeable with Knowledge of Ordinary Laws of Nature.—Railroad hands are chargeable with knowledge of the ordinary laws of nature; and weight and its effect in an instrument used by employees, when manifest, must be recognized; and an employee in possession of knowledge of the material and construction of an implement used in his employ cannot complain that ordinary laws of physics were not explained to him by his employer. So held in *Gulf, etc., R. Co. v. Williams*, 72 Tex. 159, 12 S. W. 172.

Coupling—Double Buffers—Inexperienced Brakeman.—The increased danger of coupling cars with double buffers being an obvious danger, open to the ordinary observation of any one using ordinary care, it is not negligence in a railroad to fail to instruct an inexperienced brakeman as to such danger. So held in *East Tennessee, etc., R. Co. v. Turnaville*, 97 Ala. 122, 12 So. 63.

Coupling Cars—Insufficiency of Space between Cars.—When it is apparent to the eye that there is not sufficient space for two cars to be coupled by a man standing between them, the danger of so coupling is obvious, and therefore the company is not bound to warn the coupler. So held in *Simms v. South Carolina R. Co.*, 26 S. Car. 490, 2 S. E. 486.

Difference in Location of Hand-Grab of Foreign Car.—In *Woods v. Northern Pac. R. Co.*, 36 Wash. 658, 15 R. R. R. 365, 38 Am. & Eng. R. Cas., N. S., 365, 79 Pac. 309, it is held that a railroad, in fulfilling the duty enjoined upon it by certain statute of Washington and the Constitution of that state of receiving and transferring cars from other railroads, is bound to inspect such cars to see that no hidden danger menaces its employees, but is not bound to inform an employee of a

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difference in construction between the foreign car and its own cars, such as a difference in the location of the hand-grab of a freight car, which is perfectly obvious to the employee, and the risk of which he therefore assumes, without being expressly informed thereof.

Removing Plates of Metal from Locomotive—Repairs—Danger of Falling upon Workmen.—In Louisville, etc., *R. Co. v. Boone* (Ky.), 128 S. W. 1087, it appeared that plaintiff, a youth of 16 or 17, was employed as helper in the repair of tanks connected to locomotives, in which work large pieces of steel or iron which were riveted together were removed from the tanks by a man inside cutting them off after which the pieces were knocked off and allowed to fall to the ground, and, as plaintiff was coming around the end of one of the tanks which was being repaired, one of the plates so removed fell on his foot. It was held that plaintiff was not entitled to recover on the ground that defendant should have stationed some one to warn him of the danger of the falling metal or that it was about to be knocked off.

Duty to Build Fences from Cattle Guards to Line Fence.—In *Fuller v. Lake Shore, etc., R. Co.*, 108 Mich. 690, 66 N. W. 593 it is held that a railroad owes no duty to its employees to build fences from its cattle guards to the line fence, in order to advise them of the presence of such guards, especially where the guard is plainly visible, and is located at a place where, by common experience, it may well be expected.

Collisions with Cattle in Pasture—Unfenced Track.—In *Patton v. Central Iowa R. Co.*, 73 Iowa 306, 307, 35 N. W. 149 it is held that where a railroad runs through a pasture, and the right of way is not fenced, cattle may be expected anywhere, and the company is not chargeable with negligence in failing to inform a new employee that cattle had been frequently encountered on the track at a particular place in the pasture, and might be expected there as a possible cause of the derailment of a train.

Mail Crane Not Unnecessarily Near Track.—In *Denver, etc., R. Co. v. Burchard* (Colo.), 21 R. R. R. 361, 44 Am. & Eng. R. Cas., N. S., 361, it is held that if a mail crane was not located unnecessarily near defendant's railroad track, defendant was not negligent in failing to warn its employees of its location and the danger incident thereto.

Trolley Posts too Near Track in Town.—Conductor entering the employ of an electric street railway, whose tracks at places run on one side of a road through a country town, where some of its trolley posts are so near the track that a person on the running board of a car would necessarily strike them, assumes the risk of an injury thus caused without being warned of the danger. *Ladd v. Brockton St. R. Co.*, 180 Mass. 454, 62 N. E. 730.

Conductor Struck by Car on Other Track While Standing on Running Board.—In *Fletcher v. Philadelphia Traction Co.*, 190 Pa. 117, 42 Atl. 527 an action against a street railway to recover damages for the death of a conductor, a verdict should be directed in favor of defendant where the evidence shows that the deceased had been a conductor in defendant's employ for nine years on a double track railway;

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that at the time of the accident he was standing upon the running board of an open summer car pulling down the curtains during a thunder storm; that he was struck by a car on the other track; that the distance between the tracks was thirty-seven inches; that the deceased's experience had been exclusively in running closed cars; and that he had been given no warning or instruction as to open cars.

Brakeman Alighting from Moving Train upon Pile of Gravel.—A brakeman jumped from a slowly moving train while in the course of his employment, and by alighting on a pile of gravel slipped under the cars, and was injured. The gravel was placed along the track for the improvement and repair of the roadbed, and decedent knew of its presence. It was held that the danger of alighting was obvious, and the railroad was not negligent in failing to warn the brakeman of such danger. *Louisiana, etc., R. Co. v. Miles (Ark.)*, 25 R. R. R. 475, 48 Am. & Eng. R. Cas., N. S., 475, 103 S. W. 158.

2. LATENT DANGERS.

But a master is required by law to point out and explain to his servants all hidden dangers with which he is, and they are not chargeable with notice.

United States.—*Ellis v. Northern Pac. R. Co. (C. C.)*, 103 Fed. Rep. 416; *McGowan v. La Platta Mining, etc., Co.*, 9 Fed. Rep. 861; *Mercantile Trust Co. v. Pittsburg, etc., R. Co. (C. C. A.)*, 115 Fed. Rep. 475; *Mountain Copper Co. v. Pierce (C. C. A.)*, 136 Fed. Rep. 150; *Northwestern Fuel Co. v. Danielson*, 6 C. C. A. 636, 57 Fed. Rep. 915; *Orman v. Salvo (C. C. A.)*, 117 Fed. Rep. 233; *Pullman Palace Car Co. v. Harkins*, 5 C. C. A. 326, 55 Fed. Rep. 932; *Rillston v. Mather*, 44 Fed. Rep. 743; *The Anchoria*, 113 Fed. Rep. 982; *Western Union Tel. Co. v. Burgess (C. C. A.)*, 108 Fed. Rep. 26.

Alabama.—*Holland v. Tennessee Coal, etc., Co.*, 91 Ala. 444, 8 So. 524; *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Robinson Mining Co. v. Tolbert*, 132 Ala. 462.

Arkansas.—*Fones v. Phillips*, 39 Ark. 17; *St. Louis, etc., R. Co. v. Morgaft*, 45 Ark. 318; *Southwestern Tel. Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575.

California.—*Elledge v. National City, etc., R. Co.*, 190 Cal. 282; *Ingeman v. Moore*, 90 Cal. 410, 27 Pac. 306; *Ryan v. Los Angeles Ice, etc., Co.*, 112 Cal. 244, 44 Pac. 471; *Tedford v. Los Angeles Elect. Co.*, 134 Cal. 76, 66 Pac. 76.

Colorado.—*Colorado City v. Liafe*, 28 Colo. 468; *Holshouser v. Denver Gas, etc., Co.*, 18 Colo. App. 431.

Delaware.—*Punhouski v. Newcastle Leather Co.*, 4 Penn. (Del.), 544.

District of Columbia.—*McDade v. Washington, etc., R. Co.*, 5 Mackey (D. C.), 144; *Staubley v. Potomac Elect. Power Co.*, 21 App. Cas. (D. C.), 160.

Georgia.—*Augusta v. Owens*, 111 Ga. 464, 36 S. E. 830; *Central R. Co. v. Kenney*, 64 Ga. 103; *Cheaney v. Ocean Steamship Co.*, 92 Ga.

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726, 19 S. E. 33; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13; *East Tenn., etc., R. Co. v. Bridges*, 92 Ga. 399, 17 S. E. 645.

Illinois.—*Chicago, etc., R. Co. v. Kerr*, 148 Ill. 605, 35 N. E. 1117; *Chicago, etc., R. Co. v. Spurney*, 197 Ill. 471, 64 N. E. 302; *Illinois Steel Co. v. McNulty*, 105 Ill. App. 594; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 65 N. E. 734; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183; *Kewanee Boiler Co. v. Erickson*, 181 Ill. 549, 54 N. E. 1044; *Kirk v. Scally*, 79 Ill. App. 67; *McFarland v. Edmunds Mfg. Co.*, 97 Ill. App. 629; *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 214, 73 N. E. 416; *Morris v. Malone*, 200 Ill. 132, 65 N. E. 704; *Pittsburg, etc., R. Co. v. Hewitt*, 102 Ill. App. 428; *Rogers v. Cleveland, etc., R. Co.*, 211 Ill. 126, 71 N. E. 850; *Shickle-Harrison, etc., Iron Co. v. Beck*, 212 Ill. 268, 72 N. E. 423; *Swift v. Fue*, 66 Ill. App. 651; *Walsh v. Chicago*, 94 Ill. App. 311; *Western Stone Co. v. Musical*, 196 Ill. 382, 63 N. E. 664; *Western Tube Co. v. Polobinski*, 192 Ill. 113, 61 N. E. 451.

Indiana.—*Fletcher Bros. Co. v. Hyde (Ind. App.)*, 75 N. E. 9; *Hammond & Co. v. Schweitzer*, 112 Ind. 246, 13 N. E. 869; *Hill v. Gust*, 55 Ind. 45; *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30; *Louisville, etc., R. Co. v. Graham*, 124 Ind. 89, 24 N. E. 668; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584; *New Albany Forge, etc., Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Pittsburg, etc., Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Pittsburg, etc., R. Co. v. Parish*, 28 Ind. App. 189; *Salem Stone, etc., Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411; *St. Louis, etc., R. Co. v. Valiruis*, 56 Ind. 511.

Iowa.—*Grannis v. Chicago, etc., R. Co.*, 81 Iowa 444, 46 N. W. 1067; *Klauffke v. Bettendorf Axle Co.*, 125 Iowa 223, 100 N. W. 1116; *Norris v. Cudahy Packing Co.*, 124 Iowa 478, 100 N. W. 853; *Vohs v. Short-hill Co.*, 124 Iowa 471, 100 N. W. 495.

Kansas.—*Brower v. Timreck*, 66 Kan. 770, 71 Pac. 581; *Consolidated, etc., Co. v. Sharber (Kan.)*, 81 Pac. 476.

Kentucky.—*Collins v. Louisville, etc., R. Co. (Ky.)*, 86 S. W. 973; *Louisville, etc., R. Co. v. Bowcock (Ky.)*, 51 S. W. 580; *United States Laundry Co. v. Schilling (Ky.)*, 56 S. W. 425.

Louisiana.—*Daly v. Kiel*, 106 La. 170; *James v. Rapides Lumber Co.*, 50 La. Ann. 717, 23 So. 469; *Myhan v. Louisiana Electric, etc., Co.*, 41 La. Ann. 964, 6 So. 799; *Stewart v. Texas, etc., R. Co.*, 113 La. 525; *Strucke v. Orleans R. Co.*, 50 La. Ann. 172, 23 So. 342; *Thompson v. New Orleans, etc., R. Co.*, 108 La. 52.

Maine.—*Erickson v. Monson Consol. Slate Co.*, 100 Me. 107; *Welch v. Bath Iron Works*, 98 Me. 361.

Massachusetts.—*Atkins v. Merrick Thread Co.*, 142 Mass. 431, 6 N. E. 826; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 70 N. E. 1025; *Grimaldi v. Lane*, 177 Mass. 565, 59 N. E. 451; *Jarvis v. Coes Wrench Co.*, 177 Mass. 170, 58 N. E. 587; *Joyce v. American Writing Paper Co.*, 184 Mass. 230, 68 N. E. 213; *Knight v. Overman Wheel Co.*, 174 Mass. 455, 54 N. E. 890; *Manning v. Excelsior Laundry Co.*, 189 Mass. 231, 75 N. E. 254; *Marti-*

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neau *v.* National Blank Book Co., 166 Mass. 4, 43 N. E. 513; O'Connor *v.* Adams, 120 Mass. 427.

Michigan.—Barr *v.* Guelph Patent Cash Co., 129 Mich. 278, 88 N. W. 640; Chicago, etc., R. Co. *v.* Bayfield, 37 Mich. 205; Chilson *v.* Lansing Wagon Works, 128 Mich. 43, 87 N. W. 79; Geller *v.* Briscoe Mfg. Co., 136 Mich. 330, 90 N. W. 281; Hathaway *v.* Michigan Cent. R. Co., 51 Mich. 253, 16 N. W. 634; Henry *v.* Lake Shore, etc., R. Co., 49 Mich. 495, 13 N. W. 832; Kopf *v.* Monroe Stone Co., 133 Mich. 286, 104 N. W. 313; LaBarre *v.* Grand Trunk, etc., R. Co., 133 Mich. 192, 94 N. W. 735; Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 7 N. W. 791; Smith *v.* Peninsular Car Work, 60 Mich. 501, 27 N. W. 662.

Minnesota.—Dell *v.* McGrath, 92 Minn. 187, 99 N. W. 629; Deweese *v.* Meramec Iron Min. Co., 128 Mo. 423, 31 S. W. 110; Gray *v.* Commutator Co., 85 Minn. 463, 89 N. W. 322; Jensen *v.* Commodore Min. Co., 94 Minn. 53, 101 N. W. 944; Kohout *v.* Newman (Minn.), 104 N. W. 764; Lane *v.* Minnesota State Agricultural Soc., 62 Minn. 175, 64 N. W. 382; McDonald *v.* Chicago, etc., R. Co., 41 Minn. 439, 43 N. W. 380; Peterson *v.* American Grass Twine Co., 90 Minn. 343, 96 N. W. 913; Torske *v.* Commonwealth Lumber Co., 86 Minn. 276, 90 N. W. 532.

Missouri.—Cameron *v.* Roth Tool Co., 108 Mo. App. 265; Clark *v.* Missouri, etc., R. Co., 179 Mo. 66, 77 S. W. 882; Deweese *v.* Meramec Iron Min. Co., 128 Mo. 423, 31 S. W. 110; Dowling *v.* Allen, 102 Mo. 213, 14 S. W. 752; Gibson *v.* Midland Bridge Co., 112 Mo. App. 594; Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79; Hysell *v.* Swift, etc., Co., 78 Mo. App. 39; Musick *v.* Jacob Dold Packing Co., 58 Mo. App. 322; Nickel *v.* Columbia Paper Stock Co., 95 Mo. App. 226; Reisert *v.* Williams, 51 Mo. App. 13; Rodney *v.* St. Louis, etc., R. Co., 127 Mo. 676, 28 S. W. 887, 30 S. W. 150.

Montana.—Allen *v.* Bell, 32 Mont. 69, 79 Pac. 582; Berg *v.* Boston, etc., Co., 12 Mont. 212, 29 Pac. 543; Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633.

Nebraska.—Chicago, etc., R. Co. *v.* Lundstrom, 16 Neb. 254, 20 N. W. 198; Kearney Electric Co. *v.* Laughlin, 43 Neb. 390, 63 N. W. 941; Stephenson *v.* Ravenscroft, 25 Neb. 678, 41 N. W. 652.

New Hampshire.—Boyce *v.* Johnson, 72 N. H. 41; Kasjeta *v.* Nashua Mfg. Co. (N. H.), 58 Atl. 874; Miller *v.* Boston, etc., R. Co. (N. H.), 61 Atl. 360; Murray *v.* Boston, etc., R. Co., 72 N. H. 32; Thomas *v.* Exeter, etc., St. R. Co. (N. H.), 58 Atl. 838.

New Jersey.—Curley *v.* Hoff, 62 N. J. L. 758; Foley *v.* Jersey City Electric Light Co., 54 N. J. L. 411; Lechman *v.* Hooper, 62 N. J. L. 758; Paulmier *v.* Erie R. Co., 34 N. J. L. 151; Smith *v.* Oxford Iron Co., 42 N. J. L. 467; Tompkins *v.* Maine Engine, etc., Co., 70 N. J. L. 330.

New York.—Bohn *v.* Havemeyer, 46 Hun (N. Y.), 557; Campbell *v.* New York Cent., etc., R. Co., 35 Hun (N. Y.), 556; Dyer *v.* Brown, 64 N. Y. App. Div. 89; Felice *v.* New York Cent., etc., R. Co., 14 N. Y. App. Div. 345, 43 N. Y. S. 922; Fowler *v.* Buffalo Furnace Co., 41 N. W. App. Div. 84, 58 N. Y. S. 223; Gates *v.* State, 128 N. Y. 221; Helmke *v.*

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Stetler, 69 Hun (N. Y.), 107, 23 N. Y. S. 392; Kochman *v.* Chase, 32 N. Y. App. Div. 630, 52 N. Y. S. 740; Latorre *v.* Central Stamping Co., 9 N. Y. App. Div. 145, 41 N. Y. S. 99; McGarry *v.* New York, etc., R. Co., 60 N. Y. Super. Ct. 367, 18 N. Y. S. 195; Maltby *v.* Belden, 45 N. Y. App. Div. 384, 60 N. Y. S. 824; Nelson *v.* City of New York, 101 N. Y. App. Div. 18; O'Brien *v.* Buffalo Furnace Co., 68 N. Y. App. Div. 451; Raftery *v.* Central Park, etc., R. Co., 14 Misc. 560, 35 N. Y. S. 1067; Reinig *v.* Broadway R. Co., 49 Hun 269, 1 N. Y. S. 907; Ryan *v.* Johns Mfg. Co., 46 N. Y. St. Rep. 305, 18 N. Y. S. 754; Simone *v.* Kirk, 173 N. Y. 7; Spaulding *v.* O'Brien, 26 N. Y. Misc. 184, 56 N. Y. S. 1095; Thall *v.* Carnie, 5 N. Y. Supp. 244; Wendling *v.* Bainbridge, 6 N. Y. St. Rep. 21.

North Carolina.—Allison *v.* Southern R. Co., 129 N. Car. 336, 40 S. E. 91; Turner *v.* Goldsboro Lumber Co., 119 N. Car. 387, 26 S. E. 23; Turrentine *v.* Wellington, 136 N. Car. 308.

Ohio.—Joswoyak *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. 317; New York, etc., R. Co. *v.* Roe, 25 Ohio Cir. Ct. 628; Toomey *v.* Avery Stamping Co., 11 Ohio Cir. Dec. 216; Wainright *v.* Lake Shore, etc., R. Co., 11 Ohio Cir. Dec. 530.

Oregon.—Hough *v.* Grant's Pass Power Co., 41 Ore. 531.

Pennsylvania.—Conger *v.* Wiggins, 208 Pa. St. 122, 57 Atl. 341; De Grazia *v.* Piccardo, 15 Pa. Super. Ct. 107; Durst *v.* Carnegie Steel Co., 173 Pa. St. 162, 33 Atl. 1102; Levy *v.* Rosenblatt, 21 Pa. Super. Ct. 543; Patterson *v.* Harrisburg Trust Co., 211 Pa. St. 173, 60 Atl. 265.

Rhode Island.—Flynn *v.* Shaw, 22 R. I. 328.

South Carolina.—Biggers *v.* Catawba Power Co., 72 S. Car. 264; Gallman *v.* Union Hardwood Mfg. Co., 65 S. Car. 192, 43 S. E. 524; Hightower *v.* Bamberg Cotton Mills, 48 S. Car. 190, 26 S. E. 222; Hutchins *v.* Mills Mfg. Co., 68 S. Car. 512.

Tennessee.—Tennessee, etc., R. Co. *v.* Jarrett (Tenn.), 82 S. W. 224.

Texas.—Galveston, etc., R. Co. *v.* Manns (Tex. Civ. App.), 84 S. W. 254; Galveston, etc., R. Co. *v.* Mortson, 31 Tex. Civ. App. 142, 71 S. W. 770; General Electric Co. *v.* Murray, 32 Tex. Civ. App. 226, 74 S. W. 50; Gulf, etc., R. Co. *v.* Melville (Tex. Civ. App.), 87 S. W. 863; Ft. Worth, etc., R. Co. *v.* Smith (Tex. Civ. App.), 87 S. W. 371; Fordyce *v.* Yarborough, 1 Tex. Civ. App. 260; Hernischel *v.* Texas Drug Co., 26 Tex. Civ. App. 1, 61 S. W. 419; Houston, etc., R. Co. *v.* Higgins, 22 Tex. Civ. App. 430, 55 S. W. 744; International, etc., R. Co. *v.* Smith (Tex. Civ. App.), 30 S. W. 501; International, etc., R. Co. *v.* Tisdale, 39 Tex. Civ. App. 372, 87 S. W. 1063; Martin *v.* Wrought Iron Range Co., 4 Tex. Civ. App. 185, 23 S. W. 387; Missouri Pac. R. Co. *v.* Callbreath, 66 Tex. 526, 1 S. W. 622; Missouri Pac. R. Co. *v.* Watt, 64 Tex. 568; Missouri, etc., R. Co. *v.* Jones (Tex. Civ. App.), 75 S. W. 53; San Antonio Foundry Co. *v.* Drish (Tex. Civ. App.), 85 S. W. 440; Southern Pac. R. Co. *v.* Winton, 27 Tex. Civ. App. 503; Texarkana, etc., R. Co. *v.* Toliver (Tex. Civ. App.), 84 S. W. 375; Texas Mexican R. Co. *v.* Douglas, 73 Tex. 325, 11 S. W. 333; Texas, etc., R. Co. *v.* Kelly, 34

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Tex. Civ. App. 21; Texas, etc., R. Co. *v.* Gardner (Tex. Civ. App.), 69 S. W. 217.

Utah.—Downey *v.* Gemini Min. Co., 24 Utah 431, 68 Pac. 414; Leach *v.* Oregon Short Line R. Co., 29 Utah 285, 81 Pac. 90; Mathews *v.* Daly-West Min. Co., 27 Utah 193, 75 Pac. 722; Trihay *v.* Brooklyn Lead Min. Co., 4 Utah 468, 11 Pac. 612.

Virginia.—Pocahontas Collieries Co. *v.* Rukas' Adm'r (Va.), 51 S. E. 449; Richmond, etc., R. Co. *v.* Williams, 86 Va. 165, 9 S. E. 990.

Washington.—Decker *v.* Stimson Mill Co., 31 Wash. 522, 72 Pac. 98; Dossett *v.* St. Paul, etc., Lumber Co., 40 Wash. 276, 82 Pac. 273; McMillan *v.* North Star Min. Co., 32 Wash. 579, 73 Pac. 685; Morton *v.* Moran Bros. Co., 30 Wash. 362, 70 Pac. 968; Myrberg *v.* Baltimore, etc., Min. Co., 25 Wash. 364, 65 Pac. 539; Rush *v.* Spokane Falls, etc., R. Co., 23 Wash. 501, 63 Pac. 500; Shannon *v.* Consolidated Tiger, etc., Min. Co., 24 Wash. 119, 64 Pac. 169; Shoemaker *v.* Bryant, etc., Co., 27 Wash. 637, 68 Pac. 380.

West Virginia.—Richards *v.* Riverside Iron Works, 56 W. Va. 510, 49 S. E. 437.

Wisconsin.—Sladky *v.* Martinette Lumber Co., 107 Wis. 250, 83 N. W. 514; Stackman *v.* Chicago, etc., R. Co., 80 Wis. 428, 50 N. W. 404; Strahtendorf *v.* Rosenthal, 30 Wis. 375; Yess *v.* Chicago Brass Co., 124 Wis. 406, 102 N. W. 932.

Canada.—Canadian Pac. R. Co. *v.* Boisseau, 32 Can. Sup. Ct. 424; George Matthews Co. *v.* Bouchard, 8 Quebec Q. B. 550; Choate *v.* Ontario Rolling Mill Co., 27 Ont. App. 155.

Defective Roadbed.—A railroad, whose roadbed is so constructed as to expose its trainmen to dangers which are not obvious, must warn those who are to incur them of their existence. Paulmier *v.* Erie R. Co., 34 N. J. L. 151.

Duty to Notify Trainmen as to Condition of Track.—In Chicago, etc., R. Co. *v.* Kerr, 148 Ill. 605, 35 N. E. 1117, an action by a fireman for an injury sustained by being thrown from his engine, it is held that if unsafe condition of the track is shown, and knowledge of such fact is admitted by the company's superintendent, plaintiff's right to recover will not depend upon the degree of care defendant is required to exercise in providing a safe track, and the company will be liable for failure to give notice to those in charge of the train of the condition of the track, so that they might have lessened the speed in crossing the defective portion.

Washouts and Landslides—Failure to Give Notice of General Dangerous Condition of Track—Wreck—Brakeman Injured.—In Mercantile Trust Co. *v.* Pittsburg, etc., R. Co. (C. C. A.), 6 R. R. R. 354, 29 Am. & Eng. R. Cas., N. S., 354, 115 Fed. Rep. 475, it appeared that a brakeman on the second section of a fast freight train on a railroad operated by a receiver was killed in a wreck at night, caused by a landslide. There had been heavy rains during the day along that portion of the road, and a storm in the evening, of unusual, if not unprecedented, violence, causing a number of landslides and washouts,

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which were known to the train dispatcher; and he notified the conductor and engineer of the first section of the train, on leaving the last station, to look out for landslides at various places specified, but which did not include the place where the wreck subsequently occurred. Those in charge of the second section, which left 20 minutes later, received no notice or warning at all. It was held that the failure to give such notice of the general dangerous condition of the track was culpable negligence, which was the proximate cause of the accident.

Trestle Threatened by Drift—Attempt to Remove Debris at Night—Insufficient Warning and Light—Drowned.—In *Stewart v. Texas, etc., R. Co. (La.)*, 13 R. R. R. 158, 36 Am. & Eng. R. Cas., N. S., 158, 37 So. 129, it appeared that the small stream in question, owing to the rising waters, was about 300 feet in width, with a strong current. There was a railroad trestle across the stream which was threatened by the drift jammed against it. A foreman and nine men undertook to remove the debris on a dark, cold night, by insufficient light. In pulling up the logs a limb broke from a tree, and a man seated on one of the cross-pieces of the trestle was thrown into the bayou and drowned. The weight of the testimony was that he was not sufficiently warned of the danger; that he was ordered by the foreman to the place on the trestle from which he was thrown; and that the light was dim, and not such a light as should have been provided to do dangerous work on a dark night. It was held that sufficient light should have been provided, the situation explained, and the danger warned against.

Uncovered Wire of Interlocking Switch Device.—In an action for injuries to defendant's brakeman resulting from a wire of an interlocking switch device being uncovered from the derail to the distant signal, defendant could not establish freedom from negligence by showing that the construction of the switch device was similar to the construction of similar devices upon other first-class railroads, without further showing, if such construction was liable to cause injuries to employees working about the device, that it had given notice of the danger, or given plaintiff an opportunity to observe it. So held in *Indiana, etc., R. Co. v. Bundy (Ind.)*, 14 Am. & Eng. R. Cas., N. S., 660.

Brakeman Struck by Low Bridge.—In *Alee v. South Carolina R. Co.*, 21 S. Car. 550, it appeared that plaintiff was struck and injured by the roof of a bridge while acting as brakeman on top of defendant's train. There was some evidence that he was put in such position by the railroad company; that the bridge was known to the latter to be too low to permit a person to stand erect in safety on top of a passing car; and that plaintiff was uninformed and unwarned of such danger. It was held that was not error to refuse to grant a non-suit or direct verdict for defendant.

Handle of Switch too Near Steps of Cars Passing in Yard—Injury to Switchman.—In *Chicago, etc., R. Co. v. Riley (C. C. A.)*, 20 R. R. R. 403, 43 Am. & Eng. R. Cas., N. S., 403, it is held that where defendant railroad company located a switch stand as a part of its pre-

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arranged plans for the construction of its yards in such a position between two tracks that under certain conditions likely to arise the handle of the switch would come in contact with the steps of passenger cars passing the stand, but such danger was neither obvious nor known to plaintiff, a switchman, who was injured by having his hand crushed between the switch handle and a car step, defendant was guilty of negligence in failing to warn plaintiff of the danger.

Post Near Track.—In *Wilson v. New York, etc., R. Co.* (R. I.), 29 R. R. R. 135, 52 Am. & Eng. R. Cas., N. S., 135, 69 Atl. 364, it is held that if the exigencies of the situation are such as to compel a railroad company to place its tracks so near a post as to render it a source of danger, or to allow the post to remain so near the track as to be dangerous, the company should notify its employees of the danger.

Electric Light Pole Near Track—Danger to Conductor.—In *Savage v. Rhode Island Co.* (R. I.), 25 R. R. R. 206, 48 Am. & Eng. R. Cas., N. S., 206, it is held that where the danger to a street car conductor in consequence of an electric light pole being maintained near the track was either not obvious or extraordinary, it was the duty of the company to warn the conductor of the danger and instruct him with respect thereto.

Pushing Car over Unfinished Track—Crushed between Car and Bank.—In *Stackman v. Chicago, etc., R. Co.*, 80 Wis. 428, 50 N. W. 404, it appeared that a gang of men, under the direction of defendant's foreman were engaged in pushing a car over an unfinished portion of the track which, on one side, was near a high bank, so near at one place that a person could not pass between a car and the bank. The car had been started by the other men. Plaintiff, being directed by the foreman to assist in the pushing, took hold of the car at the only available place left by the other men, which was on the side towards the bank. The foreman had not warned him of the danger. After the car had moved twelve or fourteen feet, he was caught in the narrow place and crushed between the car and the bank. He testified that he did not know of the narrow place. He had no time for deliberation or to look ahead after being directed to push. The ground was rough and muddy, and while pushing he looked down to see where to step. It was held that defendant, through the foreman, was negligent in failing to warn him of the danger.

Digging Out Car of Gravel Train—Failure to Station Watchman—Fall of Gravel from Bank.—In *Burlington, etc., R. Co. v. Crockett*, 19 Neb. 138, 26 N. W. 921, it appeared that the under boss of a gravel train gang was directed by his immediate superior to take men and dig out a car which had been partly covered and derailed by a fall of gravel from a high bank and while obeying this order was killed by the bank caving in. It had been the custom to station a watchman to give notice to the workman of danger from the falling bank, which was not done on the occasion in question. It was held that the railroad was liable.

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Hand Brakes with Limber Staffs.—In *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645, 18 So. 75, it is held that where hand brakes are in use by a railroad company, some of which have stiff, and others limber staffs, differing from each other only in the size of their staffs, and the limber ones are shown to be inherently dangerous in the hands of inexperienced brakeman, ignorant of how to handle them, it is the duty of the company to use the less dangerous kind, or to warn the inexperienced operator of the increased danger from the use of the more dangerous brake.

Breaking of Running Board While Repairing Locomotive.—In *Ellis v. Northern Pac. R. Co. (C. C.)*, 103 Fed. Rep. 416, it is held that a railroad is liable for injuries sustained by one of its servants employed as a boiler maker and repairer of iron work on locomotives, through the breaking of a running board which he was directed to stand upon while making repairs to a locomotive, where the railroad knew it was in an unsafe condition and failed to inform the employee of the fact.

Invitation to Come upon Dangerous Premises.—An invitation from the master or proprietor to come upon dangerous premises, without apprising the invited person of the danger, is just as culpable in the case of a servant, as in any other. So held in *Strucke v. Orleans R. Co.*, 50 La. Ann. 172, 23 So. 342.

3. LATENT DANGERS NOT DISCOVERABLE BY EXERCISE OF ORDINARY CARE.

But an employer is not chargeable with knowledge of the latent hazards of his service, arising from defects or otherwise, which are not discoverable by the exercise of reasonable care, and, of course, is not required to warn his servants against such dangers.

Arizona.—*Gila Valley, etc., R. Co. v. Lyon (Ariz.)*, 71 Pac. 957.

Georgia.—*Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 13.

Michigan.—*Bauer v. American Car, etc., Co.*, 132 Mich. 537, 94 N. W. 9; *Kopf v. Monroe Stone Co.*, 133 Mich. 286, 104 N. W. 313.

Montana.—*Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515.

New Jersey.—*Carrington v. Mueller*, 65 N. J. L. 244; *Crittensen v. Lambert*, 67 N. J. L. 341; *Diehl v. Standard Oil Co.*, 70 N. J. L. 424.

North Carolina.—*Martin v. Highland Park Mfg. Co.*, 128 N. Car. 264, 38 S. E. 876.

Ohio.—*Diamond Rubber Co. v. McClurg*, 26 Ohio Civ. Ct. 481; *San Antonio Sewer Pipe Co. v. Noll (Tex. Civ. App.)*, 83 S. W. 900.

Virginia.—*Gay v. Southern R. Co.*, 101 Va. 466, 44 S. E. 707.

Where there are dangers known to the master, or of which he ought to have knowledge by the use of ordinary care, or which are not ordinarily and usually incident to the business, it is his duty to inform an employee of such danger when hiring him, unless the danger is so apparent that the latter will be bound to take notice

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of it. *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584.

Only Dangers Reasonably to Be Anticipated.—The duty of a master to warn servants of a transitory danger of the employment extends only to those whose exposure thereto ought reasonably to be anticipated. *Lord v. Boston & Maine R. R.*, 74 N. H. 39.

Special Danger Arising from Particular Fact Not to Be Anticipated.—In *Gay v. Southern R. Co. (Va.)*, 8 R. R. R. 537, 31 Am. & Eng. R. Cas., N. S., 537, 44 S. E. 707, it is held that when a servant enters upon an employment, it is the duty of the master to inform him of the nature of the risk and peril to be incurred in the course of his employment, but not as to a special danger which springs out of a particular fact, which in its details cannot be anticipated.

Posts Near Track.—In *Mobile, etc., R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416, it is held that if the danger from posts near a railroad track is known to the company but is not known to a trainman, and is not so obvious that he would discover it by the exercise of ordinary care, it is the legal duty of the railroad to notify him of the danger.

Dismantling Railroad Trestle—Failure to Appreciate Danger—Master Not Chargeable with Notice.—In *Grayson-McLeod Lumber Co. v. Carter (Ark.)*, 88 S. W. 597, it is held that where it is not shown that the master was chargeable with notice that a servant engaged in dismantling a railroad trestle did not appreciate the dangers to which he was exposed, it was not the duty of the master to instruct the servant in regard to such dangers.

Same Opportunity as Employer—Continuing in Service.—And an employee who has the same opportunity as his employer to ascertain a danger incident to his service assumes the risk by accepting and continuing in the service. *Crane v. Chicago, etc., R. Co.*, 124 Iowa 81, 99 N. W. 169.

4. CHANGES IN APPLIANCES OR WORK PLACE.

And a master must notify his servants in regard to all changes in tools, appliances or work places which may expose them to new, or increased, and latent perils, which the servants are not bound to discover for themselves by the exercise of reasonable care.

United States.—*O'Neil v. St. Louis, etc., R. Co.*, 9 Fed. Rep. 337; *Tennessee Coal, etc., Co. v. Currier (C. C. A.)*, 108 Fed. Rep. 19; *Withcofsky v. Wier*, 32 Fed. Rep. 337.

Illinois.—*Chicago Gen. R. Co. v. McNamara*, 94 Ill. App. 188; *Walsh v. Chicago*, 94 Ill. App. 311.

Minnesota.—*Johnson v. Crookston Lumber Co. (Minn.)*, 103 N. W. 891; *Vant Hul v. Great Northern R. Co.*, 90 Minn. 329, 96 N. W. 789.

Missouri.—*Chambers v. Chester*, 172 Mo. 461; *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588, 25 Am. & Eng. R. Cas. 440.

New York.—*Spelman v. Fisher Iron Co.*, 56 Barb. (N. Y.), 151.

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Pennsylvania.—*Bartholomew v. Kemmerer*, 211 Pa. St. 277; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514.

South Carolina.—*Hutchins v. Mills Mfg. Co.*, 68 S. Car. 512.

South Dakota.—*Hedlun v. Holy Terror Min. Co.*, 16 S. Dak. 261.

Texas.—*Galveston, etc., R. Co. v. Quay*, 27 Tex. Civ. App. 516, 66 S. W. 219; *Texarkana, etc., R. Co. v. Toliver* (Tex. Civ. App.), 84 S. W. 375; *Texarkana Table, etc., R. Co. v. Webb* (Tex. Civ. App.), 86 S. W. 782.

Utah.—*Downey v. Gemini Min. Co.*, 24 Utah 431, 68 Pac. 414.

Virginia.—*Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. (Va.), 805; *Lane Bros. & Co. v. Bauserman*, 103 Va. 146, 48 S. E. 857.

In *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, it is held that if, by reason of a master's omission to supply the usual and ordinary means to prevent accident, the hazard of his servants is increased, and a change in appliances made is not known to his servants, nor so open and visible that they, by the exercise of ordinary care, can see and know of it, the legal duty will rest upon the master to notify them of the new or increased danger to which they are thereby exposed.

Engines with Unusual Couplings.—It is the duty of a railroad if it uses engines without the usual kind of couplings to explain to its employees any increased hazard from using them. So held in *Galveston, etc., R. Co. v. Garrett*, 73 Tex. 262, 13 S. W. 62.

Car-Coupler Not Commonly Used and Not Reasonably Safe.—In *Grannis v. Chicago, etc., R. Co.*, 81 Iowa 444, 46 N. W. 1067, it is held that where the car-coupler used by a railroad on one of its freight cars was one not commonly used and was not reasonably safe when used with such cars, and one employed as a "wiper," having no previous knowledge that such coupler was in use, nor of its dangerous character, while attempting to make a coupling with such car was injured by reason of the use of such coupler, it was held that the company was negligent in not informing him of the dangers of such service and of the methods of avoiding them.

Unusually Dangerous Coupling—Coupling Moving Cars.—In *Galveston, etc., R. Co. v. Garrett*, 73 Tex. 262, 13 S. W. 62, it appeared that a brakeman was injured in attempting to make a coupling between an engine in motion and a freight car, and that to the engine was attached an unusual coupling more dangerous than those in ordinary use, of which he was uninformed and unwarned. It was held that a verdict in his favor would not be disturbed.

Coupling Baldwin Car—Drawheads of Different Construction—Failure to Warn—Night.—In *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588, 25 Am. & Eng. R. Cas. 440, the evidence tended to show that the coupling of a Baldwin locomotive car to a car of defendant, in consequence of the unusual construction of the drawheads of the former, was extra dangerous; that to those acquainted with them the Baldwin cars were known as the "man killers;" that plaintiff was directed,

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on a dark night, to couple one of these cars to one of defendant's; that he had never before made this coupling, and he had no knowledge of the dangerous and unusual construction of the drawhead of the Baldwin car; that while, from the light of his lantern, he could see the place for the drawhead to enter, it did not apprise him of the dangerous character of the blocks attached to the drawhead, which caused his arm to be crushed while attempting to put in the coupling pin. It was held that a demurrer to this evidence was properly overruled.

Coupling Work—Train Moved by Road Engine Instead of Switch Engine—Custom.—In *Edington v. St. Louis, etc., R. Co. (Mo.)*, 24 R. R. R. 707, 47 Am. & Eng. R. Cas., N. S., 707, 102 S. W. 491, it is held that it was negligence for a yardmaster directing the making up of a train to fail to notify a switch crew that the train would be moved by the road engine while certain coupling work was being done; it being customary for the train to be moved at such times only by the switch engine.

Broken Draw-Bar—Uncoupling without Special Direction.—In *Donahoe v. Old Colony R. Co.*, 153 Mass. 356, 26 N. E. 868, an action for injuries to a brakeman on a freight train, it appeared that his post of duty was at the forward end of the train, a part of his duty being to do the uncoupling there, that the conductor in the brakeman's absence chained to the engine a car upon which a draw-bar was broken, and when he met the plaintiff shortly afterwards told him to be at his post, but omitted to mention the broken draw-bar; and that at the next stop, during the conductor's temporary absence upon a duty connected with the proper management of the train, the brakeman, while attempting without special orders from the conductor, and in ignorance of the danger from the broken draw-bar, to uncouple such car from the engine, so that the engine might assist in making up the train, was caught between the engine and the car by reason of the broken draw-bar and injured. It was held that whether the conductor's omission to warn him of the broken draw-bar amounted to negligence which was the proximate cause of the injury was a question for the jury.

Switch of Different Operation.—In *Cincinnati, etc., R. Co. v. Gray (C. C. A.)*, 101 Fed. Rep. 823, it appeared that a receiver substituted a new and different kind of switch for one formerly used in a switch yard. The new switch was reasonably safe, and properly constructed, but operated in a different manner from that of the one it replaced, and, under very probable conditions, was dangerous to those using it in ignorance as to its operation; but no regulations or other instructions were given the employees in the yard as to its use. Within two or three days after the switch was put in a car was derailed in attempting to pass over it, and a yard foreman who was riding thereon was killed, under circumstances clearly indicating that if he had known the manner in which the switch was operated the accident

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would not have occurred. It was held that the receiver was liable for having failed in his duty to give proper instructions.

Yard Master's Failure to Communicate as to Proper Use of Automatic Switch—Train Derailed.—In *Thomas v. Cincinnati, etc., R. Co.* (C. C.), 97 Fed. Rep. 245, it appeared that there had been placed in the switching track in question an automatic switch, intended to be ordinarily set by hand, and depended upon the automatic only in emergency. The yardmaster in charge of the track informed the employees using the track that it would work automatically at all times, and a train attempted to be run across the switch when it was not set was derailed, causing the death of an employee. It was held that the yardmaster's failure to communicate the proper use of the switch to the employees using it was a breach of duty for which the railroad was liable.

Time Tables—Temporary Changes—Duty to Inform Trainmen.—A railroad company is bound as an employer to establish the time for running trains, their arrival at stations, and speed, and to exercise reasonable care to bring the time table and any temporary changes in it, caused by delays or otherwise, to the notice of all its employees who are charged with the duty operating trains on its track. *Frost v. Oregon, etc., R. Co.* (C. C. A.), 69 Fed. Rep. 936.

Movements and Positions of Other Trains—Trainmen Required by Rule to Protect Themselves—Collision.—But in *Little Rock & M. R. Co. v. Barry*, 84 Fed. Rep. 944, an action by an engineer to recover for personal injuries received in a rear-end collision, it appeared that by the rules of the railroad, employees in charge of trains were not to be notified as to the position and movements of other trains, but were required to protect themselves by sending out flagman, and putting torpedoes on the track, in case of unusual stoppages. These rules were adopted pursuant to the recommendation of a committee of experts, and were in force on more than 50,000 miles of railroad in the United States. Three experts testified that these rules were better calculated to prevent accidents, by always requiring trainmen to be vigilant, than was the system of attempting to keep them informed as to the position of all trains. Three other experts testified that in the particular case the engineer and conductor of each train should have been notified of the location and movements of the other. It was held that it was error to charge, that, in sending out special trains, due and sufficient notice should be given of the whereabouts of all other trains which are liable to be met or overtaken.

5. SAME—RULE APPLIES TO LATENT HAZARDS ONLY.

But this rule is not applicable unless the causes of the increased hazards arising from the substitution of the new machinery or appliances for the old are latent, and such as it is not the duty of the employee to discover in the exercise of reasonable care. *Bryant v. Great Northern Paper Co.*, 100 Me. 171, 60 Atl. 767.

Chargeable with Knowledge of Visible Qualities.—An employee

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using new machinery requiring a different kind of management from that he has been accustomed to use is chargeable with knowledge of its visible qualities and the ordinary working or effect of such qualities. So held in *Gulf, etc., R. Co. v. Williams*, 72 Tex. 159, 12 S. W. 172.

Different Coupling Apparatus.—In *Boland v. Louisville, etc., R. Co.*, 106 Ala. 641, 18 So. 99, it is held that where the increased risk or hazard of coupling cars with different coupling apparatus than those in ordinary use by the railroad company is open to the ordinary observation of any person using reasonable care and prudence, the failure of the company to instruct or warn in brakeman specially in regard to the increased risk of coupling such cars, is not negligence on the part of the company; the danger being obvious and incident to the employment.

New Locomotive.—There is no duty on the part of the employer railroad to instruct a skilled and experienced engineer in the dangers of a new locomotive which he is set to operate, where the new locomotive is of the same general character as the one to which he had been accustomed. *Bellows v. Pennsylvania, etc., R. Co.*, 157 Pa. St. 51, 27 Atl. 685.

6. WORK RENDERED HAZARDOUS BY EXTRANEOUS CAUSE.

If an employee is assigned work which is naturally safe, but becomes dangerous from outside causes, the master, if the danger comes, or should come to his knowledge, must warn the employee, and failure to do so will render him liable on account of resultant injuries to the servant, unless the latter should have discovered it for himself.

United States.—*The Pioneer*, 78 Fed. Rep. 600.

Alabama.—*Perry v. Marsh*, 25 Ala. 659.

California.—*Baxter v. Roberts*, 44 Cal. 187.

Colorado.—*Holshouser v. Denner Gas, etc., Co.*, 18 Colo. App. 431.

Louisiana.—*Ragland v. St. Louis, etc., R. Co.*, 49 La. Ann. 1166, 22 So. 366.

Minnesota.—*Lane v. Minnesota State Agricultural Soc.*, 62 Minn. 175, 64 S. W. 382.

North Carolina.—*Smith v. Atlanta, etc., R. Co.*, 132 N. Car. 819.

7. WORK NOT WITHIN SCOPE OF EMPLOYMENT.

The master is under no legal obligation to warn or instruct a servant in regard to the hazards incident to work outside the scope of the latter's employment, which he has undertaken voluntarily and without orders or direction. *De Souza v. Strafford Mills*, 155 Mass. 476, 30 N. E. 81; *Leistritz v. American Zylonite Co.*, 154 Mass. 382, 28 N. E. 294; *Kopf v. Munroe Stone Co.*, 133 Mich. 286, 104 N. W. 313; *Albanese v. Central R. Co.*, 70 N. J. L. 241; *McCue v. National Starch Mfg. Co.*, 142 N. Y. 106; *Reining v. Broadway R. Co.*, 49 Hun.

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(N. Y.), 269, 1 N. Y. S. 907; *St. Louis, etc., R. Co. v. Spivey*, 97 Tex. 143, 76 S. W. 748, 10 R. R. R. 697, 33 Am. & Eng. R. Cas., N. S., 697.

Call Boy Riding around Yards on Steps of Freight Car.—In *St. Louis, etc., R. Co. v. Spivey*, 97 Tex. 143, 10 R. R. R. 697, 33 Am. & Eng. R. Cas., N. S., 697, 76 S. W. 748, it is held that no duty rests upon a railroad company to warn a call boy, employed to carry messages and do other errands around the yards, and station, as to the danger to be apprehended from riding around the yards on the steps of a freight car, when his duties do not require him, and he is not expected to ride on such trains.

8. DIRECTED TO PERFORM WORK NOT WITHIN SCOPE OF EMPLOYMENT.

But if a master orders a servant to perform a service not within the scope of his employment, the same rule applies, and with equal force, in regard to the duty to warn and instruct, that governs in the case of work within the scope of employment.

United States.—*Felton v. Griardy* (C. C. A.), 104 Fed. Rep. 127.

California.—*Daubert v. Western Meat Co.*, 135 Cal. 144; *Mansfield v. Tagle, etc., Co.*, 136 Cal. 622.

Delaware.—*Giordano v. Brandy Wine Granite Co.*, 3 Penn. (Del.), 423; *Quinn v. Johnson Forge Co.*, 9 Houst. (Del.), 338.

Florida.—*Camp v. Hall*, 39 Fla. 535, 22 So. 792.

Indiana.—*Keller v. Gaskill*, 20 Ind. App. 502, 50 N. E. 363.

Iowa.—*Nelson v. Chicago, etc., R. Co.*, 77 Iowa 405, 42 N. W. 335.

Massachusetts.—*Laplante v. Warren Cotton Mills*, 165 Mass. 487, 43 N. E. 294.

Minnesota.—*Small v. Brainerd Lumber Co.* (Minn.), 103 N. W. 726.

New York.—*Dyer v. Brown*, 64 N. Y. App. Div. 89.

Pennsylvania.—*Rummel v. Dilworth, etc., Co.*, 131 Pa. St. 509, 19 Atl. 345.

Rhode Island.—*Mann v. Oriental Print Works*, 11 R. I. 152.

Tennessee.—*Tennessee Coal, etc., Co. v. Jarratt*, 111 Tenn. 565, 82 S. W. 224.

Texas.—*Texarkana, etc., R. Co. v. Preacher* (Tex. Civ. App.), 59 S. W. 593; *Texas, etc., R. Co. v. Utley*, 27 Tex. Civ. App. 472, 66 S. W. 311; *Waxachachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 226.

Virginia.—*Virginia Iron, etc., Co. v. Tomlinson* (Va.), 51 S. E. 362.

Working Outside Scope of Employment without Objection—Foreman of Construction Gang Directed to Do Switching—Making Coupling.—In *Cole v. Chicago, etc., R. Co.*, 71 Wis. 114, 37 N. W. 84, it appeared that the foreman of a gang of men engaged in constructing bridges and buildings for a railroad company was directed to take his engine and men and do some switching, and undertook the work without objection and was injured while personally making a coupling. It was held that the rule applicable was that when an employee of mature years and ordinary intelligence and experienced is directed

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to do a temporary work outside the business he has engaged to do, and consents to do such work, without objection on account of his want of knowledge, skill, or experience in doing such work, no negligence of the employer can be predicated upon that state of facts alone.

9. WORK PLACE RENDERED UNSAFE BY OTHER WORK.

If the performance of other and a different class of work for the master renders the place where one of his employees is required to perform his service unsafe, the employer must inform the latter in regard to the new hazard in time to give him a reasonable opportunity to avoid it.

United States.—*Western Elect. Co. v. Hanselmann* (C. C. A.), 136 Fed. Rep. 564.

Illinois.—*Street's Western Stable Car Line v. Bonander*, 196 Ill. 15, 63 N. E. 688.

Indiana.—*Lake Erie, etc., R. Co. v. Charman*, 161 Ind. 95, 67 N. E. 923.

Kansas.—*Coffeyville Vitriified Brick, etc., Co. v. Shanks* (Pac.), 69 Kan. 306.

Massachusetts.—*Bowes v. New York, etc., R. Co.*, 181 Mass. 89, 62 N. E. 949; *Carroll v. New York, etc., R. Co.*, 182 Mass. 237, 65 N. E. 69.

North Carolina.—*Smith v. Atlanta, etc., R. Co.*, 132 N. Car. 819, 44 S. E. 663.

Texas.—*International, etc., R. Co. v. Tisdale* (Tex. Civ. App.), 87 S. W. 1063; *Gulf, etc., R. Co. v. Melville* (Tex. Civ. App.), 87 S. W. 863.

Virginia.—*Virginia Iron, etc., R. Co. v. Lore* (Va.), 51 S. E. 371.

Approach of Train—Failure of Foreman to Warn.—In *D'Agostino v. Pennsylvania R. Co.* (N. J.), 60 Atl. 1113, it appeared that plaintiff's intestate was employed by the defendant to work on its railway tracks. It was a part of the system under which the men worked upon the tracks that the foreman should, upon the approach of a train on a certain track, call out, "Look out on track No. 3!" or "Look out on track No. 4!" as the fact was, and for the men on such track to get out of the way until the train passed. Plaintiff's intestate was injured by an engine running over him because of the failure of the foreman to give this customary warning. It was held that the giving of the warning was embraced in the duty owed by defendant to deceased that the place where he worked should be kept safe, and that the failure to perform this duty was imputable to defendant as an employer.

Scraping Snow from Tracks—Struck by Train.—In *Bradley v. New York Cent. R. Co.*, 62 N. Y. 99, it appeared that defendant's foreman or trackmaster, whose duty it was to keep its tracks clear from snow, and who was accustomed to do so with men hired temporarily for that purpose, employed plaintiff with his team to scrape the tracks. The

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day was very stormy, and, plaintiff was the only man out with a team, and he was ignorant of the time of the passage of trains and unused to the work. He objected to the employment upon these grounds, but the foreman agreed to advise him of the approach of trains, and, thereupon, plaintiff consented to undertake the work. While engaged in the work he was struck by a train of whose coming the foreman had failed to advise him. It was held that plaintiff was not required to be on the lookout or to listen for trains; and that on account of the failure of the foreman to perform his agreement defendant railroad was liable.

Working on Switch Tracks—Approach of Trains.—A railroad company should provide means by which employees at work on or near switch tracks at a station will be notified of the approach of cars. *International, etc., R. Co. v. Hinzie*, 82 Tex. 623, 18 S. W. 681.

Failure to Give Signals from Switch Engine—Collision with Employee.—In *McLeod v. Chicago, etc., R. Co.*, 104 Iowa 139, 73 N. W. 614, it is held that employees operating a switch engine, whose duty it is to be on the lookout for employees on or near the track and to warn them of the approach of the engine by ringing the bell or blowing the whistle, or in some other manner, are not as a matter of law free from negligence toward an employee walking along the track in the course of his duty, where no signal of any kind is given of the approach of such engine and the employee is struck by it.

Foreman Stopping Hand Car Suddenly—Notice to Men Working Lever—Custom.—The foreman of a hand car, stopping it suddenly by an application of the brake while moving rapidly on a down grade, at a place where it was not usual to stop, and without giving notice to the men working the lever, may be guilty of negligence, without proof of any custom requiring him to give notice. So held in *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

Moving Train against Car Being Loaded with Lumber—Hand Killed by Fall of Lumber.—A car, on the spur or side-track in which men are employed loading it with heavy lumber, should not be subjected to any contact with moving trains, at least without notice or warning to the men thus employed; and if, without such notice, one of the men is killed by the fall of the lumber dislodged by the jolt incident to coupling the car in which the men are at work with other cars, the railroad will be liable. So held in *Ragland v. St. Louis, etc., R. Co. (La.)*, 49 La. Ann. 1166, 22 So. 366.

Freight Handler Struck by Train—Absence of Signals.—A freight handler does not assume the risk of the failure of a conductor of a freight train to give a customary warning of its approach. So held in *Carroll v. New York, etc., R. Co.*, 182 Mass. 237, 65 N. E. 69.

Foreman Suddenly Stopping Hand Car—Knowledge That Hands Sometimes Let Go of Lever.—In *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262, it is held that if the foreman of a hand car, knowing that the men who work the handles of the lever sometimes let go the handle after pushing it down, on a down grade, and have

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nothing else to hold on to, suddenly applies the brake and stops the car, without notice to them, and without looking to see that none of them are in such dangerous position, the court may instruct the jury that this is negligence.

Working Near Track—Failure to Give Train Signals.—In *Erickson v. St. Paul, etc., R. Co.*, 41 Minn. 500, 43 N. W. 332, it appeared that plaintiff and others were engaged, with defendant's knowledge, in grading for a new track alongside and parallel to defendant's main track. The ordinary duties of the work frequently required them to be in such close proximity to defendant's original track as to be liable to be struck by passing trains. It had been the uniform practice of those operating trains on the railroad to give these workmen warning of their approach by signals. It was held that defendant owed the workmen the duty of active vigilance to give them proper signals of the approach of trains.

Section Man Working on or Near Track—Approach of Train.—Where a section man working on or dangerously near to the railroad track, is unaware of an approaching train, or by reason of peculiar circumstances is not likely to discover it in time to save himself from injury, and this should be apparent to the persons managing the train if they were using reasonable care, it is their duty to give him reasonable warning of the approach of the train. So held in *Schulz v. Chicago, etc., R. Co.*, 57 Minn. 271, 59 N. W. 192.

Tamping Ties—Approach of Train—Failure of Boss to Warn—Custom.—In *Germanus v. Lehigh Valley R. Co.* (N. J.), 27 R. R. R. 622, 50 Am. & Eng. R. Cas., N. S., 622, 67 Atl. 79, it appeared that plaintiff's intestate was one of a gang of men employed by defendant on its tracks tamping ties. The evidence at the close of plaintiff's case proved a custom that the men should be warned by the boss or foreman of the approach of a train, and that the plaintiff's intestate was killed by a train because of the failure of the foreman to give such warning. It was held that upon such uncontradicted proof a motion to nonsuit was rightfully denied.

Failure of Foreman to Inform Switchman That Switch Had Been Turned—Switchman Run Over.—Where a switchman is run over while passing from one switch to another in order to turn the latter, the jury must determine whether it was negligence on the part of the railroad that the foreman, who had turned the switch so that there was no need for the switchman to go to it, failed to inform him that the switch had been turned. *Grant v. Union Pac. R. Co.* (C. C.), 45 Fed. Rep. 673.

Track Repairer Struck by Train—Change of Train and Schedule.—In *Baltimore & O. R. Co. v. Whittington*, 30 Gratt. (Va.), 805, it is held that where an employee of defendant railroad, while engaged in mending the track, is struck by a train, if the accident was the result of a change of the usual train from an accommodation train of moderate rate of travel, to what is known as a lighting express train of a rate of travel from twenty-five to thirty-five miles per hour, and of a change of schedule of the time of running the train past the point at which the

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employee was killed, and said changes were by the chief authority of the railroad company, and the death of deceased was without fault on his part, and the company had not given notice of such changes to their employees, failure to give such notice was negligence, for which defendant was liable.

Approach of Trains—Duty of Trackman Working Alone to Lookout for His Own Safety.—But in *Precodnick v. Lehigh Valley R. Co.* (N. J.), 26 R. R. R. 426, 49 Am. & Eng. R. Cas., N. S., 426, 65 Atl. 1047, it appeared that plaintiff's intestate was a track laborer in the employ of the defendant, and that while it was shown that it was a part of the system, under which the men worked together as a gang upon the tracks, that the foreman should warn them of approaching danger, yet it appeared that it was the custom that when one was working alone and separated from the rest of the gang he should lookout for his own safety. Deceased had been sent to a point to work 325 feet from the other men. He was struck by a train and killed. It was held that defendant owed no duty to deceased, while so working of giving him warning.

Flagman Struck by Train While Lighting Switch Lamps—Effect of Having Duty to Look for Trains.—And in *Conniff v. Louisville, etc., R. Co.* (Ky.), 26 R. R. R. 665, 49 Am. & Eng. R. Cas., N. S., 465, 99 S. W. 1154, it is held that where the employee of a railroad company, employed as flagman at a street crossing, and whose duty it was to light each night and take away each morning certain switch lamps, received injuries, resulting in death, by being struck, by one of defendant's trains while performing his duties in connection with the lights, the failure of the servants on such train to keep a lookout for the flagman or give him warning of the approach of the train was not negligence rendering it liable for the injuries received by him, since it was his duty to keep a watch for approaching trains; and the fact that he was injured while attending to his duties connected with the lamps did not impose upon the company a higher or different degree of care that it would be held to if his sole duty was that of flagman.

Cleaning Track after Snowstorm—Approach of Trains.—Track cleaning after a snowstorm in the vicinity of moving trains is intrinsically a dangerous occupation, and the fair presumption is not only that men who engage in it take the risks of their employment, but that they are competent to keep themselves out of manifest and unnecessary exposure to danger without being warned or instructed. So held in *Nye v. Pennsylvania R. Co.*, 178 Pa. 134, 35 Atl. 627.

Custom to Run Irregular Trains at Any Time without Notice—Engine with Snow-Plough Sent Out in Storm.—And in *Olson v. St. Paul, etc., R. Co.*, 38 Minn. 117, 35 N. W. 866, it is held that where it is the established practice and one of the rules of a railway company to run special or irregular trains at any time, without notice in advance to station agents or sectionmen, who are required to govern themselves accordingly, and it appears from the evidence that an engine with a snow-plough is a train of that class, the sending out such a train over the road, in a storm, without such notice, was not negligence.

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10. EXPERIENCED EMPLOYEES.

Of course, a master, as a general rule, is not required to warn or instruct a servant whom he has a right to suppose is experienced in regard to, and competent to perform the duties of—the employment for which he has applied, in regard to the ordinary incidental risks of the service.

United States.—*Cincinnati, etc., R. Co. v. Mealer*, 50 Fed. Rep. 725; *King v. Morgan (C. C. A.)*, 109 Fed. Rep. 446; *Mississippi River Logging Co. v. Schneider*, 74 Fed. Rep. 195.

Alabama.—*Northern Alabama Coal, etc., Co. v. Beacham*, 140 Ala. 422.

California.—*Fries v. American Lead Pencil Co.*, 141 Cal. 610, 75 Pac. 164.

Illinois.—*American Malting Co. v. Lelivelt*, 101 Ill. App. 320; *Reynolds v. Grace*, 115 Ill. App. 473.

Indiana.—*Arcade File Works v. Juteau*, 15 Ind. App. 460, 40 N. E. 818; *Peterson v. New Pittsburg Coal, etc., Co.*, 149 Ind. 260, 49 N. E. 8.

Iowa.—*Campbell v. Illinois Cent. R. Co.*, 124 Iowa 302, 100 N. W. 30; *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337, 60 N. W. 651.

Maine.—*Erickson v. Monson Consolidated Slate Co.*, 100 Me. 107;

Massachusetts.—*Bence v. New York, etc., R. Co.*, 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417; *Brundige v. Dodge Mfg. Co.*, 183 Mass. 100, 66 N. E. 604; *Buston v. Harvard Brewing Co.*, 183 Mass. 438, 67 N. E. 356; *Conner v. Draper Co.*, 182 Mass. 184, 65 N. E. 39; *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731; *Cushman v. Cushman*, 179 Mass. 601, 61 N. E. 262; *Flynn v. Campbell*, 160 Mass. 128, 35 N. E. 453; *Foley v. Pettie Machine Works*, 149 Mass. 294, 21 N. E. 304; *Harrington v. Union Cotton Mfg. Co.*, 182 Mass. 566, 66 Atl. 414; *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442; *La Belle v. Montague*, 174 Mass. 453, 54 N. E. 859; *Thain v. Old Colony R. Co.*, 161 Mass. 353, 37 N. E. 309; *Ward v. Connor*, 182 Mass. 170, 64 N. E. 968.

Michigan.—*Berlin v. Mershon*, 132 Mich. 183, 93 N. W. 248; *Carnes v. Guelph Patent Cask Co. (Mich.)*, 104 N. W. 322; *Fenlon v. Duluth, etc., R. Co.*, 108 Mich. 284, 66 N. W. 51; *Nowakowski v. Detroit Stove Works*, 130 Mich. 308; *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478, 30 N. W. 109; *Willis v. Besser-Churchill Co.*, 126 Mich. 659, 86 N. W. 133.

Missouri.—*Herbert v. Mound City, etc., Co.*, 90 Mo. App. 305; *Jackson v. Missouri Pac. R. Co.*, 104 Mo. 448, 16 S. W. 413; *Livengood v. Joplin-Galena, etc., Co.*, 179 Mo. 229; *Mueller v. LaPrelle Shoe Co.*, 109 Mo. App. 506.

Nebraska.—*Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 N. W. 821; *Weed v. Chicago, etc., R. Co.*, 5 Neb. 623.

New Hampshire.—*O'Hare v. Coheco Mfg. Co.*, 71 N. H. 104; *St. Jean v. Tolles, etc., Co.*, 72 N. H. 587; *Saucer v. New Hampshire Spinning Mills*, 72 N. H. 292.

New Jersey.—*Murphy v. Rockwell Engineering Co.*, 70 N. J. L. 374.

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New York.—*Benfield v. Vacuum Oil Co.*, 75 Hun. 209, 27 N. Y. S. 16; *McManus v. Davitt*, 94 N. Y. App. Div. 481; *Ogley v. Miles*, 139 N. Y. 458; *Wahl v. Chatillon*, 56 N. Y. App. Div. 554, 65 N. Y. S. 504.

Pennsylvania.—*Bellows v. Pennsylvania, etc., Co.*, 157 Pa. St. 51, 27 Atl. 685; *Cracraft v. Bessemer Limestone Co.*, 210 Pa. St. 15, 59 Atl. 432; *Fletcher v. Philadelphia Traction Co.*, 190 Pa. St. 117, 42 Atl. 527.

Texas.—*Parish v. Missouri, etc., R. Co.* (Tex. Civ. App.), 76 S. W. 234; *Hettich v. Hillje*, 33 Tex. Civ. App. 571, 77 S. W. 641.

Washington.—*Sandquist v. Independent Telephone Co.*, 38 Wash. 313, 80 Pac. 539.

Wisconsin.—*Dougherty v. West Superior Iron, etc., Co.*, 88 Wis. 343, 60 N. W. 274.

Duty to Examine Applicant for Employment.—When a person enters the employment of a railroad company the company is not bound to examine him as to his experience or fitness, unless the applicant is a child. So held in *O'Neal v. Chicago, etc., R. Co.*, 132 Ind. 110, 31 N. E. 669.

Application for Employment as Assertion of Competency.—In *Union Pac. R. Co. v. Estes*, 37 Kan. 715, 16 Pac. 131, it is held that, ordinarily, when an adult person solicits employment in a particular line of work, the act of solicitation is an assertion by the person seeking employment that he is competent to discharge all its ordinary duties, and it is one of the general, implied conditions of every contract for service, with an adult person, that the servant is competent to discharge the duties for which he is employed.

False Assertion of Experience as Brakeman.—In *Stanley v. Chicago, etc., R. Co.*, 101 Mich. 202, 59 N. W. 393, it is held that where an applicant for employment as a brakeman on a regular freight train, in order to obtain the position, falsely states to the agent of the railway company to whom the application is made, and to the conductor to whose train he is assigned under such employment, that he has had experience in the line of work mentioned, the company has a right to believe that he is familiar with the work, and govern itself, as to instructing him regarding the manner of its performance, accordingly.

Admission of Inexperience but Assertion of Competency.—In *McDermott v. Atchison, etc., R. Co.*, 56 Kan. 319, 43 Pac. 248, it is held that a person who solicits and obtains employment in a particular line of duty, even though he makes known the fact that he is wholly inexperienced in that particular occupation, yet holds himself out as competent to perform the duties he undertakes, cannot charge his employer with the consequences of his own want of knowledge respecting the duties of his employment.

Rules of the Service.—As a general rule it is not the duty of an employer to instruct his employees as to the rules of the service, or warn him of dangers incident thereto, unless information is asked. *Missouri Pac. R. Co. v. Callbreath*, 66 Tex. 526, 1 S. W. 622.

Lookouts.—In *Chicago, etc., R. Co. v. Donahue*, 75 Ill. 106, it is held

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that railroad employees are presumed to contract with references to the hazards incident to the service, and it is not the duty of the company to place one employee on the lookout to warn others of such an approaching danger.

A master is not required to keep special watch over the employee and warn him of common dangers to which he may be subjected in the performance of ordinary duties. *Ring v. Missouri Pac. R. Co.*, 112 Mo. 220, 20 S. W. 436.

Place as Safe as Others.—A servant is not entitled to recover because the service required at a particular place was dangerous, and the master failed to inform the servant of that fact, in consequence of which he was injured, when it does not appear that such place was more dangerous than other places connected with his employment. So held in Chicago, etc., *R. Co. v. Clark*, 108 Ill. 113.

Proper Manner of Using Wrench—Fall Caused by Breaking of Wrench.—The failure of a master to instruct an adult servant of average intelligence as to the manner in which he should use a wrench in securing nuts on a rod so as to avoid falling in case the wrench should break is not negligence. *Garnett v. Phoenix Bridge Co. (C. C.)*, 98 Fed. Rep. 192.

Removing Old Rails—Method of Breaking Bolts—Presumption of Knowledge.—In St. Louis, etc., *R. Co. v. Jamison (Ark.)*, 31 R. R. R. 677, 54 Am. & Eng. R. Cas., N. S., 677, 113 S. W. 41, it is held that railroad section hands whose principal duty was to remove old rails, often necessitating the breaking of the bolts joining them, were presumed to know how to do the breaking, and it was not the duty of the foreman in ordering a bolt broken to direct the method.

Setting Spring—Use of Piece of Rail Instead of Square Bar, as Wedge—Injury to Assistant.—In *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337, 60 N. W. 651, it appeared that a machinist in the employ of a railroad had authority to ask other employees to assist him on occasions when he could not alone do a particular piece of work; that on one such occasion, in setting a spring, a piece of rail was used where ordinarily a square bar was used; that the rail was more likely to slip, and did slip and injure one of such helping employees; and that this could have been prevented had wooden blocks, of which there were a number in the shop, been used as wedges. It was held that it was not necessary to warn such employees of the danger of such work, as they knew it themselves. *Hathaway v. Illinois Cent. R. Co.*, 92 Iowa 337, 60 N. W. 651.

Climbing Moving Car—Struck by Car Left too Near Switch in Yard.—In *Bence v. New York, etc., R. Co.*, 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417, it is held that where an experienced railroad employee, thoroughly familiar with the yard in which he was working, was injured while climbing up the side of a moving car by being struck by another car left too near a switch, the fact that the company had not warned him of dangers of this kind did

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not charge it with negligence, there being no duty to warn him of what he already knew.

Operating Circular Saw—Sufficiency of Experience.—In *Wilson v. Steel Edge Stamping, etc., Co.*, 163 Mass. 315, 39 N. E. 1039, it appeared that A., who was nearly twenty-one years old, and who, two years previously, had been employed in a factory for several weeks, working some of the time with a circular saw, applied at B.'s factory for work. B.'s superintendent took him to a workman, and asked the latter if he had any work for A. to do. The man took A. to a circular saw, and asked him if he had ever run a saw, and A. replied that he had a very little, but was not an experienced hand. The man then set the gauge and ran through two or three sticks, and then told A. to go to work. A. did so, and the men watched him run through two or three sticks and then went away, giving no instructions to A., who asked none, and informed no one that he was in need of instructions. He continued to work with the saw for ten days, when he was injured. It was held that at the time when the accident occurred he was not so young and inexperienced that it was a breach of duty on B.'s part not to give him warning or instruction.

Snow-Banks—Signals to Protect Trainmen.—Railroads are not obliged to place signals at snow-banks along their tracks, nor to give notice by whistle or bell of the approach of a train to a snow-bank, in order to protect trainmen from injury. So held in *Brown v. Chicago, etc., R. Co.*, 69 Iowa 161, 28 N. W. 487.

Switches without Lights.—It is not negligence to have switches without lights on them in a railroad yard, unless it appears that it is the common and uniform practice to have such lights, and that the switchmen had the right to expect them. So held in *Grant v. Union Pac. R. Co. (C. C.)*, 45 Fed. Rep. 673.

Construction of Staging Duty to Instruct Masons.—In *Burns v. Washburn*, 160 Mass. 457, 36 N. E. 199, it is held the facts that the superintendent employed by a contractor, who is engaged in erecting a building, gives no instructions to the masons whom he has directed to build a certain piece of wall as to how to put up staging, and is not present when the staging is built, are not of themselves evidence of negligence on his part which will sustain an action against the contractor, under Mass. St. 1887, c. 270, § 1, cl. 2, by a person injured while employed as a mason's tender by the falling of the staging, which is negligently built by the masons, a part of whose ordinary duties it is to build staging without special orders.

Lineman Stringing Feed Wire Cable to Poles—Danger of Cable Slipping from Pins.—It is not the duty of a railroad, employing a lineman to assist in stringing a feed wire cable to its poles, to instruct or warn him that while he is grasping the cable in adjusting it on the arm of a pole it may slip from the pins intended to hold it and go off the arm carrying him with it. So held in *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511, 72 N. E. 61.

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Contract between Trolley Pole and High-Tension Wire—Death of Motorman.—In *Harrison v. Detroit, etc., R. Co.*, 137 Mich. 78, 100 N. W. 451, it is held that a motorman, killed by an electric shock due to a trolley pole coming in contact with a high-tension wire while he was removing it from its socket, assumed the risk, where it appeared that, from the length of his employment, he must have known the danger from the high-tension wire, and that the wire was within reach of the trolley pole if removed from the socket, and it was not necessary that the company should instruct him that electricity would arc if the end of the pole should come within one-half inch of the high-tension wire.

Coupling Cars—Assertion of Experience of Twenty-Seven Days.—In *Fenton v. Duluth, etc., R. Co.*, 108 Mich. 284, 66 N. W. 51, it is held that where a brakeman represented, at the time of seeking employment from defendant railroad that he had had twenty-seven days experience at such work, there was no negligence in failing to warn him of the danger of coupling cars furnished with double deadwoods.

Walking on Planked Way Over Railroad Tracks—Attempting to Cross with Knowledge That Cars on Both Sides Might Be Backed.—In *Gill v. National Storage Co.*, 70 N. J. L. 53, it appeared that plaintiff was a laboring man in the employ of contractors who were doing work upon one of defendant's buildings. In order to reach the building he walked along a planked way, that formed a crossing over several railroad tracks that were maintained upon defendant's premises. The crossing was a private way. The tracks were used in the drilling of cars in and about the business of the defendant, so that the crossing was sometimes blocked and sometimes left clear, the cars being moved over it frequently. No flagman or gateman was at any time kept at the crossing. No warning was customarily given of the backing of cars over it. Plaintiff had been employed upon the premises for several weeks and used the crossing daily, and had thereby become familiar with it and with the drilling of cars over it. He attempted to cross on one occasion when cars were close to him on either side as he passed and in such position that he knew that they were liable to be backed over the crossing. As he passed between the cars, those upon one side were suddenly and without warning pushed down upon him, so that he was caught between the cars and injured. It was held that he was not entitled to recover for injuries so sustained.

Advance Train Standing at Station—Rule Requiring Engineer to Act on Supposition.—In *Whalen v. Michigan Cent. R. Co.*, 114 Mich. 512, 72 N. W. 323, it is held that failure of the railroad company to notify an engineer that an advance train stood on the track at the station would not render it liable to him for his injury, in view of a rule of the company requiring him to act on the supposition that another train would be met, or that the main track would be occupied at the station at the time of the collision.

11. INEXPERIENCED EMPLOYEES.

But if the work which an employee is directed to perform is dan-

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gerous, and he is ignorant of such fact and inexperienced, and the master is chargeable with notice of both facts, he must point out to the employee the dangers and instruct him as to the method of avoiding them.

United States.—*Burke v. Anderson*, 69 Fed. Rep. 814; *Cumberland Telephone, etc., Co. v. Bills* (C. C. A.), 128 Fed. Rep. 272; *Felton v. Griardy* (C. C. A.), 104 Fed. Rep. 127; *Mather v. Rillston*, 156 U. S. 391, 39 L. Ed. 464; *Mountain Copper Co. v. Pierce* (C. C. A.), 136 Fed. Rep. 150; *Nyback v. Champagne Lumber Co.* (C. C. A.), 109 Fed. Rep. 732; *Reed v. Stockmeyer*, 74 Fed. Rep. 186; *Wallace v. Standard Oil Co.*, 66 Fed. Rep. 260; *Wheeler v. Oak Harbor Head Lining, etc., Co.* (C. C. A.), 126 Fed. Rep. 348; *Wright v. Stanley* (C. C. A.), 119 Fed. Rep. 330.

Alabama.—*Alabama Steel, etc., Co. v. Wrenn*, 136 Ala. 475; *Louisville, etc., R. Co. v. Binion*, 107 Ala. 645, 18 So. 75; *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 So. 277.

Arizona.—*Arizona Lumber, etc., Co. v. Mooney*, 4 Ariz. 96.

Arkansas.—*Ford v. Bodcaw Lumber Co.*, 73 Ark. 49.

California.—*Ingerman v. Moore*, 90 Cal. 410, 27 Pac. 306; *Mansfield v. Eagle, etc., Co.*, 136 Cal. 622; *Merrifield v. Maryland, etc., Min. Co.*, 143 Cal. 54, 76 Pac. 710; *O'Connor v. Golden Gate Wollen Mfg. Co.*, 135 Cal. 537, 67 Pac. 966; *Ryan v. Los Angeles Ice, etc., Co.*, 112 Cal. 244, 44 Pac. 471; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517, 47 Pac. 364.

Delaware.—*Brandywine Granite Co. (Del.)*, 3 Penn. 423; *Karczewski v. Wilmington City R. Co.*, 4 Penn. (Del.), 24; *Strattner v. Wilmington City Elec. Co.*, 3 Penn. 245.

Georgia.—*Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763; *Augusta Factory v. Barnes*, 72 Ga. 217; *May v. Smith*, 92 Ga. 95, 18 S. E. 360; *Vinson v. Morning News*, 118 Ga. 655, 45 S. E. 481.

Illinois.—*Chicago Screw Co. v. Weiss*, 203 Ill. 536; *Harris v. Shebek*, 151 Ill. 287, 37 N. E. 1015; *Nelson Mfg. Co. v. Stoltzenburg*, 59 Ill. App. 628; *Pittsburg, etc., R. Co. v. Hewitt*, 102 Ill. App. 428; *Shickle-Harrison, etc., Co. v. Beck*, 112 Ill. App. 444.

Indiana.—*Atlas Engine Works v. Randall*, 100 Ind. 293; *Brower v. Locke*, 31 Ind. App. 353; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Keller v. Gaskill*, 9 Ind. App. 670, 36 N. E. 303; *Fletcher Bros. Co. v. Hyde* (Ind. App.), 75 N. E. 9; *Flickner v. Lambert* (Ind. App.), 74 N. E. 263; *La Porte Carriage Co. v. Sullender* (Ind. App.), 71 N. E. 922; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *New Albany, etc., Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Republic Iron, etc., Co. v. Ohler*, 161 Ind. 393, 68 N. E. 901.

Iowa.—*Collingwood v. Illinois, etc., Fuel Co.*, 125 Iowa 537, 101 N. W. 283; *Sachau v. Milner*, 123 Iowa 387, 98 N. W. 900; *Shebeck v. National Cracker Co.*, 120 Iowa 414, 49 N. W. 930; *Vohs v. Shorthill Co.*, 124 Iowa 471, 100 N. W. 495; *Wilder v. Great Western Cereal Co.* (Iowa), 104 N. W. 434.

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Kansas.—Patterson *v.* Cole, 67 Kan. 441, 73 Pac. 54; Missouri Pac. R. Co. *v.* Peregoy, 36 Kan. 424, 14 Pac. 7.

Kentucky.—Henderson Cotton Mills *v.* Warren (Ky.), 70 S. W. 658; James *v.* Ames (Ky.), 82 S. W. 229; Louisville, etc., R. Co. *v.* Veach (Ky.), 46 S. W. 493; Standard Oil Co. *v.* Eiler, 110 Ky. 209.

Louisiana.—Bonnin *v.* Crowley, 112 La. 1025; Carter *v.* Dubach Lumber Co., 113 La. 239; Lindsey *v.* Tioga Lumber Co., 108 La. 468; Myhan *v.* Louisiana Electric Light, etc., Co., 41 La. Ann. 964, 6 So. 799.

Maryland.—Natiqnal Enamelin, etc., Co. *v.* Brady, 93 Md. 646; Skinner *v.* McLaughlin, 94 Md. 524, 51 Atl. 98; Yentsch *v.* Chloride, etc., Co., 96 Md. 679, 54 Atl. 877.

Massachusetts.—Atkins *v.* Merrick Thread Co., 142 Mass. 431, 8 N. E. 241; De Costa *v.* Hargraves Mills, 170 Mass. 375, 49 N. E. 735; Gilbert *v.* Guild, 144 Mass. 601, 12 N. E. 368; O'Conner *v.* Adams, 120 Mass. 427; Walsh *v.* Reet Valve Co., 110 Mass. 23.

Michigan.—Allen *v.* Jakel, 115 Mich. 484, 73 N. W. 555; McDonald *v.* Champion, etc., Co. (Mich.), 103 N. W. 829; Parkhurst *v.* Johnson, 50 Mich. 70, 15 N. W. 107.

Minnesota.—Holman *v.* Kempe, 70 Minn. 422, 73 N. W. 186; Lund *v.* Woodworth & Co., 75 Minn. 501, 78 N. W. 81; Small *v.* Brainerd Lumber Co. (Minn.), 103 N. W. 726.

Mississippi.—Illinois Cent. R. Co. *v.* Price, 72 Miss. 862, 18 So. 415.

Missouri.—Lemser *v.* St. Joseph, etc., Co., 70 Mo. App. 209; Vanesler *v.* Moser Cigar, etc., Co., 108 Mo. App. 621.

Montana.—Coleman *v.* Perry, 28 Mont. 1, 72 Pac. 42.

Nebraska.—Evans Laundry Co. *v.* Crawford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; Ittner Brick Co. *v.* Killian, 67 Neb. 589, 93 N. W. 951; Kearney Elec. Co. *v.* Laughlin, 45 Neb. 390, 63 N. W. 941; Norfolk Beet-Sugar Co. *v.* Hight, 56 Neb. 162, 76 N. W. 566; Omaha Bottling Co. *v.* Theiler, 59 Neb. 257, 80 N. W. 821.

New Hampshire.—Bennett *v.* Warren, 70 N. H. 564; Kasjeta *v.* Nashua Mfg. Co. (N. H.), 58 Atl. 874; Lapelle *v.* International Paper Co., 71 N. H. 346.

New Jersey.—Addicks *v.* Christoph, 62 N. J. L. 787; Smith *v.* Irwin, 51 N. J. L. 507.

New York.—Brennan *v.* Gordon, 118 N. Y. 489; Burke *v.* Brown, 14 N. Y. St. 619; Dyer *v.* Brown, 64 N. Y. App. 89; Flynn *v.* Erie Preserving Co., 12 N. Y. St. 88; Gamble *v.* Hine, 2 N. Y. Supp. 778; Hickey *v.* Taaffe, 105 N. Y. 26; Lofrano *v.* New York, etc., Co., 130 N. Y. 658; Lowry *v.* Anderson Co., 96 N. Y. App. Div. 465; Murphy *v.* Mairs, 6 N. Y. St. 42; Owens *v.* Ernst, 142 N. Y. 661; Sullivan *v.* Met. St. R. Co., 170 N. Y. 570.

North Carolina.—Jones *v.* American Warehouse Co., 137 N. Car. 337, 49 S. E. 355; Marcus *v.* Loane, 133 N. Car. 54, 45 S. E. 354; Turner *v.* Goldsboro Lumber Co., 119 N. Car. 387, 26 S. E. 23.

Ohio.—Bowe *v.* Bowe, 26 Ohio Cir. Ct. 409; Breckenridge *v.* Reagan, 22 Ohio Cir. Ct. 71; Cleveland Bolling-Mill Co. *v.* Corrigah, 46 Ohio St. 283; Cleveland, etc., R. Co. *v.* Tehan, 26 Ohio Cir. Ct. 457; Toomey

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v. Avery Stamping Co., 20 Ohio Cir. Ct. 183; *Wainwright v. Lake Shore, etc., Co.*, 11 Ohio Cir. Dec. 530.

Oregon.—*Bowers v. Star Logging, etc., Co.*, 41 Ore. 301; *Roth v. Northern Pac. L. Co.*, 18 Ore. 205.

Pennsylvania.—*Doyle v. Pittsburg Waste Co.*, 204 Pa. St. 618, 54 Atl. 363; *Rummel v. Dilworth, etc., Co.*, 131 Pa. St. 509, 19 Atl. 345; *Sweigert v. Klingensmith*, 210 Pa. St. 565; *Tagg v. McGeorge*, 155 Pa. St. 368, 26 Atl. 671; *Welsh v. Butz*, 202 Pa. St. 59, 51 Atl. 591.

South Carolina.—*Biggers v. Catawba Power Co.*, 72 S. Car. 264; *Hightower v. Bamberg Cotton Mills*, 48 S. Car. 190, 26 S. E. 222.

Tennessee.—*Tennessee Coal, etc., Co. v. Jarrett*, 111 Tenn. 565, 82 S. W. 224.

Texas.—*Galveston, etc., R. Co. v. Hughes*, 22 Tex. Civ. App. 134, 54 S. W. 264; *Greenville Oil, etc., Co. v. Harkey*, 20 Tex. Civ. App. 225, 48 S. W. 1005; *Gulf, etc., R. Co. v. Newman*, 27 Tex. Civ. App. 77, 64 S. W. 790; *Houston, etc., R. v. Strycharski (Tex. Civ. App.)*, 35 S. W. 851; *International, etc., R. Co. v. Hinz*, 82 Tex. 623, 18 S. W. 681; *Missouri, etc., R. Co. v. Evans*, 16 Tex. Civ. App. 68, 41 S. W. 80; *Missouri Pac. R., etc., Co. v. White*, 76 Tex. 102, 13 S. W. 65; *Texarkana, etc., R. Co. v. Preacher (Tex. Civ. App.)*, 59 S. W. 593; *Texarkana, etc., Co. v. Webb (Tex. Civ. App.)*, 86 S. W. 782; *Texas, etc., R. Co. v. Utley*, 27 Tex. Civ. App. 472, 66 S. W. 311; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 226; *Wrought Iron Range Co. v. Martin (Tex. Civ. App.)*, 28 S. W. 557.

Utah.—*Anderson v. Daly Min. Co.*, 15 Utah 22, 49 Pac. 126; *Pence v. California Min. Co.*, 27 Utah 378.

Vermont.—*Reynolds v. Boston, etc., R. Co.*, 64 Vt. 66, 24 Atl. 134.

Virginia.—*Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908; *Virginia Iron, etc., Co. v. Lore (Va.)*, 51 S. E. 371.

Washington.—*Jaucko v. West Coast Mfg. Co.*, 34 Wash. 556.

West Virginia.—*Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

Wisconsin.—*Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93; *Horn v. La Crosse Box Co.*, 123 Wis. 399; *Yess v. Chicago Brass Co.*, 124 Wis. 406, 102 N. W. 932.

England.—*Grizzle v. Frost*, 3 F. & F. (Eng.), 622; *Ogden v. Rummen*, 3 F. & F. (Eng.), 751.

Canada.—*Choate v. Ontarior Rolling Mill Co.*, 27 Ont. App. 155.

An employer must instruct his inexperienced employee as to those dangers in an employment which it requires peculiar skill and knowledge to avoid, which are known to the master and unknown to the servant. So held in *Reynolds v. Boston, etc., R. Co.*, 64 Vt. 66, 24 Atl. 134.

Apprentice Directed to Do Work Requiring Skilled Mechanic.—In *Missouri Pac. R. Co. v. Perego*, 36 Kan. 424, 14 Pac. 7, it is held that where a foreman directed an unskilled apprentice to do dangerous work that requires a skilled mechanic to perform, and directed him to call to his assistance other employees also ignorant of such work, and no notice was given to them of the danger incident to the work, and

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the foreman failed to give them instructions which, if given and followed, would have prevented the accident and one of them was killed while at such work, the employer was liable.

Tow Bridges.—When a brakeman is employed on a railroad with which he is not familiar, and is required, in the performance of his duties, to pass under a low bridge spanning the track, which, though not high enough to allow him to pass in an erect position on top of a car, is yet high enough to meet legal requirements, it is the duty of the railroad company to give him reasonable notice of the danger. So held in *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 So. 277.

Low Bridges—Brakeman's First Experience on Freight Trains.—Where decedent had been engaged as a passenger brakeman, which occupation did not require him to know the position of low bridges, it was the duty of his company, when he was sent out as rear brakeman on a freight train, under rules requiring him to be on top of his train when approaching or passing through station yards, to instruct him as to the location and height of bridges on the road and the dangers arising therefrom. So held in *Miller v. Boston & Maine R. R. (N. H.)*, 61 Atl. 360.

"Kicking Switches."—There may be negligence in connection with the use of "kicking switches," or "running switches," by failing to instruct a young and inexperienced brakeman as to the attendant dangers. *Williams v. South, etc., R. Co.*, 91 Ala. 635, 9 So. 77.

Ignorance of Difference between Single and Double Deadwoods—Minor Ordered to Make Coupling.—In *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594, it is held that where a minor, of immature judgment and inexperienced, is employed as a brakeman on a freight train, and, being ignorant of the difference between double and single deadwoods, and of the hazard attending the act of coupling cars constructed with the former, of which facts the railroad is chargeable with knowledge, is, without instruction, ordered by the conductor to couple cars furnished with double deadwoods, instead of the single deadwoods ordinarily used by the company, and in attempting to do so is injured, the railroad is liable.

Proper Method of Alighting from Moving Train—Duty to Instruct Brakeman.—In *Arkansas Cent. R. Co. v. Workman (Ark.)*, 31 R. R. R. 300, 54 Am. & Eng. R. Cas., N. S., 300, 112 S. W. 1082, it is held that a railroad company is liable for injury to a young, inexperienced brakeman by his alighting from a moving train in an improper way, where he was not instructed as to the proper way.

Unlocked Rails—Incapacity to Appreciate Danger—Youth and Inexperience.—In *Davis v. Railway*, 53 Ark. 117, 13 S. W. 215, it is said in the opinion: "But service about the unguarded rails was attended with danger, and knowledge of the fact that the rails were unblocked did not necessarily imply knowledge of the attendant danger. Knowledge of the danger was itself a question of fact, and, if the jury believed that the deceased, by reason of his youth and inexperience did

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not know of or appreciate the danger incident to the service about the unblocked rails, and the company had exposed him to the danger without warning him of it, they should have found that the risk was not one he had assumed by entering the service."

Throwing Rails upon Passing Cars—Required to Run Over Rough Ground.—In *Palmer v. Michigan Cent. R. Co.*, 93 Mich. 363, 53 N. W. 397, it is held that to require a gang of sixteen men to range themselves in line along a line of moving cars, and, acting as one man, to lift from the ground and throw upon the car as it passes a steel rail weighing from 600 to 700 pounds, and then to run fast enough on uneven ground along side of the track to be able to have the next rail in position to throw on a car of the moving train at the proper moment as it passes, at least without notifying a new and inexperienced man of the great hazard attending the performance of such work, is negligence per se.

Coupling Cars—Double Deadwoods—Several Instruction.—But in *Hathaway v. Michigan Cent. R. Co.*, 51 Mich. 253, 16 N. W. 634, it is held that the failure of a railroad to warn an inexperienced brakeman of the danger of coupling cars that are furnished with double deadwoods does not make it liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances.

Couplings of Different Construction—Only Five Days Experience.—In *Louisville, etc., R. Co. v. Miller*, 43 C. C. A. 436, 104 Fed. Rep. 124, it appeared that plaintiff applied for the position of a switchman in railroad yards, stating that he had no experience in the work. He was assigned to service under a foreman as a "cub" or learner, where he worked five days, at the end of which he induced the foreman to recommend him by letters as competent for service as a regular switchman, upon which he was employed by the yardmaster, who knew the length of his experience, and he was assigned to duty without further advice, warning or instruction. Four days later he was injured in attempting to make a coupling between cars of different construction, which could only be coupled in a certain way, of which he was ignorant. There was testimony that not less than four weeks' service as a learner could properly qualify a person to safely handle the various kind of cars which ordinarily came into the yards. It was held that a verdict for plaintiff on the ground that the railroad company failed in its duty to give him proper instruction would not be disturbed.

Hand Caught in Cog Wheels—Knowledge from Common Experience—Right to Assume.—And in *Ruchinsky v. French*, 168 Mass. 68, 64 N. E. 417, it is held that an employee, thirty years of age and of ordinary intelligence, who knows nothing of the dangers of the machine upon which he is working and who is not familiar with machinery, cannot recover of his employer for injuries occasioned to his hand by being caught in revolving cog wheels, if his employer had the right

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to assume that he had that knowledge which is acquired by common experience, and was under no obligation to warn him that if he put his hand between the wheels he would be hurt; and the fact that his employer, told him to work "quick" cannot be regarded as evidence of negligence.

12. SAME—OBVIOUS DANGERS.

Arkansas.—And if the employee, through inexperience or other cause, is incapable of fully understanding or appreciating the hazards of his service, the master must clearly explain them to him, even where they are obvious, and patent to ordinary observation. *Ford v. Bodcaw Lumber Co.*, 73 Ark. 49.

13. MINORS.

Delaware.—*Strattner v. Wilmington City Elect. Co.*, 3 Penn. 245.

Illinois.—*Siegel v. Treka*, 115 Ill. App. 56; *Marsden Co. v. Johnson*, 89 Ill. App. 100.

Indiana.—*Brower v. Locke*, 31 Ind. App. 353; *Flickner v. Lambert* (Ind. App.), 74 N. E. 263.

Iowa.—*Sachau v. Milner*, 123 Iowa 387, 98 N. W. 900; *Shebeck v. National Cracker Co.*, 120 Iowa 414, 49 N. W. 930.

Kansas.—*Patterson v. Cole*, 67 Kan. 441, 73 Pa. 54.

And this rule applies with peculiar force where the employee is a minor, likely to be of unripe judgment and discretion.

Kentucky.—*Henderson Cotton Mills v. Warren* (Ky.), 70 S. W. 658; *Standard Oil Co. v. Eiler*, 110 Ky. 209.

Louisiana.—*Gracia v. Maestri Furniture Mfg. Co.*, 114 La. 371.

Maryland.—*Mercantile Laundry Co. v. Kearney*, 97 Md. 15.

Massachusetts.—*Rudberg v. Bowden Felting Co.*, 188 Mass. 365, 74 N. E. 590.

Michigan.—*Dompier v. Lewis*, 131 Mich. 144, 91 N. W. 152; *Estez v. Pierson*, 130 Mich. 160.

Minnesota.—*Small v. Brainerd Lumber Co.* (Minn.), 103 N. W. 726; *Torske v. Commonwealth Lumber Co.*, 86 Minn. 276, 90 N. W. 532.

Missouri.—*Vanesler v. Moser Cigar, etc., Co.*, 108 Mo. App. 621.

Nebraska.—*Evans Laundry Co. v. Crawford*, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814; *Itnner Brick Co. v. Killian*, 67 Neb. 589, 93 N. W. 951.

North Carolina.—*Fitzgerald v. Alma Furniture Co.*, 131 N. Car. 636, 42 S. E. 946; *Marcus v. Loane*, 133 N. Car. 54, 45 S. E. 354.

Ohio.—*Breckenridge Co. v. Reagan*, 12 Ohio Cir. Dec. 50; *Jacobs v. Fuller, etc., R. Co.*, 67 Ohio St. 70.

Pennsylvania.—*Creachen v. Bromley Bros. Carpet Co.*, 209 Pa. St. 618; *Doyle v. Pittsburg Waste Co.*, 204 Pa. St. 618, 54 Atl. 363; *Nctlen v. Verlenden*, 211 Pa. St. 135; *Welsh v. Butz*, 202 Pa. St. 59, 51 Atl. 591.

Rhode Island.—*LeFebure v. Lawton Spinning Co.*, 24 R. I. 215; *Morancy v. Hennessey*, 24 R. I. 205.

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Tennessee.—*American Lead Pencil Co. v. Davis*, 108 Tenn. 251.

Texas.—*Galveston, etc., R. Co. v. Hitzfelder*, 24 Tex. Civ. App. 318, 66 S. W. 707; *Rayley Lumber Co. v. Goldsmith* (Tex. Civ. App.), 66 S. W. 581; *Texarkana, etc., R. Co. v. Preacher* (Tex. Civ. App.), 59 S. W. 593; *Waxahachie Oil Co. v. McLain*, 27 Tex. Civ. App. 334, 66 S. W. 226; *Wood v. Texas Cotton Product Co.* (Tex. Civ. App.), 88 S. W. 496.

Utah.—*Moyes v. Ogden Sewer Pipe, etc., Co.*, 28 Utah 148.

Virginia.—*Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908; *Virginia Iron, etc., Co. v. Tomlinson* (Va.), 51 S. E. 362.

Washington.—*Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707; *Kirkham v. Wheeler-Osgood Co.*, 39 Wash. 415.

West Virginia.—*Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

Dangerous Machinery—Inexperienced Youth.—In *May v. Smith*, 92 Ga. 95, 18 S. E. 360, it is held that the rule that an inexperienced servant who is employed to work about dangerous machinery is entitled to warning of any special danger incident to the work is not confined to the case of young children, but applies as well to a youth seventeen years of age who is inexperienced in dealing with a machine like that by which he was injured and is unacquainted with the details of its construction and mode of operation.

Presumption That Minor Needs No Instruction.—There is no presumption of law that a minor over fourteen years of age, who applies for a position involving dangerous service, is aware of the danger and needs no instruction. So held in *Atlanta, etc., R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763.

Boy Picking Slate from Top of Coal Car—His Car Struck by Another Car.—In *Fisher v. Delaware, etc., Canal Co.*, 153 Pa. 379, 26 Atl. 18, it appeared that plaintiff, a boy under thirteen years of age, was employed by defendant in picking slate from the top of loaded coal cars. Defendant and another railroad company loaded their coal into separate cars at certain schutes, from four to six hundred cars daily being run by gravity to the scales, a short distance below the schutes, and after being weighed were dropped down the track to a point where they were put into trains. On the way down it was necessary to separate the cars loaded for defendant from those of the other company. As the cars were thus being moved and made into separate trains, plaintiff, and other boys, were engaged on the top of the loaded cars picking out the slate. While plaintiff was thus at work on the second car from the rear one of a section, another car came down the track, struck the cars in front, and suddenly drove them forward. When the collision occurred, plaintiff, was in a stooping position, and, losing his balance, fell between the cars and was injured. The testimony was conflicting on the question as to whether plaintiff had been informed of the dangers incident to the employment. There was testimony to the effect that the occupation was an exceedingly dangerous one for a boy of plaintiff's age. It was held that the question of defendant's liability was for the jury.

Note

Outside Scope of Employment.—But the duty of a railroad to its employees as to giving warning against dangers to an inexperienced minor applies only to such perils as are involved in performing his duty as contemplated by his employment. *St. Louis, etc., R. Co. v. Spivey*, 97 Tex. 143, 10 R. R. R. 697, 33 Am. & Eng. R. Cas., N. S., 697, 76 S. E. 748.

Transferring Lumber to Other Cars—Presumption That Father Had Instructed His Assistant Son.—And there the work assigned to plaintiff, that of transferring lumber from the cars of one company to those of another, was not extraordinarily hazardous and dangerous, and where, before his father hired him to the railroad company, both he and his father had been engaged in precisely similar work, the father having been for some time in the employment of the company, and the son frequently assisting him in such work, such company, when it hired the plaintiff, though he was a minor, had a right to suppose that his father had given him all instruction necessary to doing the work in safety, and that plaintiff knew all about the danger attendant thereon, and the company owed him no duty as to warning him of such danger, no danger being apparent, or as to telling him how to do the work safely. *East, etc., R. Co. v. Sims*, 80 Ga. 807, 6 S. E. 595.

14. TOTAL INCAPACITY TO APPRECIATE DANGERS.

And if the master is chargeable with knowledge that a minor employee does not understand nor appreciate the hazards of his employment after being clearly and fully instructed, being incapacitated by his youth or otherwise, and he is set to work, and is injured by reason of his failure to appreciate its dangers the master is liable for the damages thereby sustained. *Henderson Cotton Mills v. Warren* (Ky.), 70 S. W. 658; *Stimper v. Fuchs, etc., Mfg. Co.*, 26 N. Y. App. Div. 333, 49 N. Y. S. 785.

15. PERSPICUITY.

A warning or instruction from a master to a servant in regard to the hazards of the employment must be so clearly and fully expressed that one of the servant's experience and apparent intelligence will necessarily be afforded reasonable facilities for knowing of and appreciating their nature and extent.

Alabama.—*Western R. Co. v. Russell* (Ala.), 30 So. 311.

District of Columbia.—*Staublely v. Potomac Elect. Power Co.* (D. C.), 21 App. Cas. 160.

Iowa.—*Wilder v. Great Western Cereal Co.* (Iowa), 104 N. W. 434.

Kentucky.—*United Laundry Co. v. Steele* (Ky.), 72 S. W. 305.

Louisiana.—*Daly v. Kiel*, 106 La. 170.

Maine.—*Bessey v. Newichawanick Co.*, 94 Me. 61.

Massachusetts.—*Atkins v. Merrick Thread Co.*, 142 Mass. 431, 8 N. E. 241.

Note

Minnesota.—*Small v. Brainerd Lumber Co.* (Minn.), 103 N. W. 726.

New Jersey.—*Addicks v. Christoph*, 62 N. J. L. 787.

New York.—*Koren v. National Conduit, etc., Co.*, 82 N. Y. App. Div. 527.

Ohio.—*Lake Shore, etc., R. Co. v. Baldwin*, 19 Ohio Cir. Ct. 338; *Lake Shore, etc., R. Co. v. Fisher*, 26 Ohio Cir. Ct. 143; *Wainright v. Lake Shore, etc., R. Co.*, 11 Ohio Cir. Dec. 530.

Rhode Island.—*Honlahan v. New American File Co.*, 17 R. I. 141, 20 Atl. 268.

Tennessee.—*Whitelaw v. Memphis, etc., R. Co.*, 16 Lea (Tenn.), 391.

Utah.—*Wilson v. Sioux Consolidated Min. Co.*, 16 Utah 392, 52 Pac. 626.

West Virginia.—*Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 569.

Work Place—Temporary Dangers Incident to Repairs.—The only duty of a master with respect to temporary and transitory dangers incident to repairs upon the place in which servants are required to work is to provide reasonable rules and regulations for their protection. *Smith v. Boston, etc., R. Co.*, 73 N. H. 325.

Duty to Notify Managers of Repair Train of Specific Washouts and Defects.—In *Graham v. Detroit, etc., R. Co.* (Mich.), 29 R. R. R. 116, 52 Am. & Eng. R. Cas., N. S., 116, 115 N. W. 993, it is held that where a work train is sent out to repair a railroad rendered unsafe by a storm before the storm had spent its force it is the duty of the company to minimize the danger of the employees on the train by sending a message properly addressed to the managers of the train, acquainting them with the specific washouts and defects in the road over which they will travel.

Working at Railroad Elevator—Approach of Cars—Announcement by Employee as Signal.—In *Speed v. Atlantic, etc., R. Co.*, 71 Mo. 304, it appeared that the signal adopted and habitually used at a certain elevator to notify the laborers engaged in loading and unloading railroad cars, of the approach of a train, was a cry by one of the employees of the elevator company: "The cars are coming." The evidence showed that this was a safer signal at that place than the ringing of a bell or the sounding of a whistle would have been. In an action against the railroad by a laborer who had been at work at the elevator for some weeks and knew the accustomed signal, to recover for an injury caused by being struck by a train, it was held that failure to ring or whistle was not negligence.

Tamping Ties—Passage of Noisy Trains on Other Track.—In *Germanus v. Lehigh Valley R. Co.* (N. J.), 27 R. R. R. 622, 56 Am. & Eng. R. Cas., N. S., 622, 67 Atl. 79, where unusual conditions are shown to have existed, such as the passing of noisy freight trains, which might interfere with employees engaged in tamping railroad ties hearing warning or signals of the dangerous approach of a train, it is properly left to the jury to say whether, under such unusual conditions, the customary warnings were sufficient.

Note

Generation and Distribution of Electricity.—A master who carries on an imminently dangerous undertaking, such as the generation and distribution of electricity, is bound to know the character and extent of the danger, and to notify the same to his servant specially and clearly, so as to be fully understood by him. So held in *Myhan v. Louisiana Electric Light, etc., Co.*, 41 La. Ann. 964, 6 So. 799.

Defective Car in Train—Injury to Car Inspector—Repair Shop Card on Each Side.—In *Shuster v. Philadelphia, etc., R. Co. (Del.)*, 19 R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6, 62 Atl. 689, an action against a railroad company for the death of a car inspector in consequence of the negligent placing of a defective car in a train, the evidence showed that it was the custom of the company to give notice of the existence of crippled cars by placing on them shop cards denoting that they were injured, and were to be taken to shops for repair; and that the crippled car in question had on each side of it, in the usual place, such a shop card. The injured car, at the time of the accident, was not used by the company in its business. It was empty, and being carried to the shop for repairs. It was held that the company was not guilty of actionable negligence in failing to give further notice of the crippled car.

Burning of Trestle—Sufficiency of Notice to Fireman.—In *St. Louis, etc., R. Co. v. Mize*, 71 Ark. 158, it is held that where the defect in a railroad track which caused injury to one of the company's fireman consisted of burning of a trestle, a notice to him of the burning and the number of the trestle and the mile posts between which it was located was sufficiently definite.

Damaged Car—Marked "Out of Order"—Inability to Read.—In *Watson v. Houston, etc., R. Co.*, 58 Tex. 434, it is held that a brakeman, injured by coupling a damaged car, cannot secure exemption from the consequences of a custom which required the car to be marked "out of order," which was done in the particular case, by showing his inability to read.

16. SAME—CHARACTERISTICS OF EMPLOYEE.

The master's duty in this regard, is, of course, affected by the age, intelligence, experience or inexperience of the employee to be instructed. The more youthful or inexperienced the employee, the more pains the master must take to make his warnings or instructions intelligible and impressive.

Delaware.—*Strattner v. Wilmington City Elec. Co.*, 3 Penn. 245.

Illinois.—*Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 29 N. E. 1106.

Indiana.—*Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502.

Massachusetts.—*Bowden v. Manlborough, etc., Machine Co.*, 185 Mass. 549, 70 N. E. 1016.

Michigan.—*Jahrmatter v. Kine*, 129 Mich. 154, 88 N. W. 383; *Small v. Brainerd Lumber Co. (Mich.)*, 103 N. W. 726.

Note

New Jersey.—Addicks *v.* Christoph, 62 N. J. L. 787.

Ohio.—Breckenridge Co. *v.* Reagan, 12 Ohio Cir. Dec. 50.

Pennsylvania.—Welsh *v.* Butz, 202 Pa. St. 59, 51 Atl. 591.

Virginia.—Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. 908.

Washington.—Kirkham *v.* Wheeler-Osgood Co., 39 Wash. 415.

Where a master is required, by his duty, to instruct his minor servant in regard to the dangers incident to a hazardous service, he must put his warning in such plain language as to be sure that the young servant understands and appreciates the danger. Addicks *v.* Christoph, 62 N. J. L. 787.

17. INFORMATION ACQUIRED BY EMPLOYEE FROM OTHER SOURCE.

The fact that the servant has acquired the necessary information in regard to the dangers of his employment and the proper means of avoiding them from another source will relieve the master from the duty of warning or instructing in regard to such hazards.

United States.—Anderson *v.* Berlin Mills Co., 88 Fed. Rep. 944; Olsen *v.* North Pac. Lumber Co., 106 Fed. Rep. 298.

Alabama.—Alabama Connellsville Coal, etc., Co. *v.* Pitts, 98 Ala. 285, 13 So. 135; Bessemer Land, etc., Co. *v.* Dubose, 125 Ala. 442, 28 So. 380; Melton *v.* Jackson Lumber Co., 133 Ala. 580; North Birmingham St. R. Co. *v.* Wright, 130 Ala. 419; Worthington *v.* Goforth, 124 Ala. 656.

Georgia.—Allen *v.* Augusta Factory, 82 Ga. 76, 8 S. E. 68.

Illinois.—Chicago, etc., Co. *v.* McDonald, 21 Ill. App. 409; Illinois Cent. R. Co. *v.* Modglin, 85 Ill. 481; McArthur Bros. Co. *v.* Nordstrom, 87 Ill. App. 554; Pennsylvania Co. *v.* Lynch, 90 Ill. 333; Simmons *v.* Chicago, etc., R. Co., 110 Ill. 340; Trakal *v.* Heusner Baking Co., 204 Ill. 179, 68 N. E. 399.

Indiana.—Big Creek Stone Co. *v.* Wolf, 138 Ind. 496, 38 N. E. 52.

Iowa.—Gorman *v.* Minneapolis, etc., R. Co., 117 Iowa 720, 90 N. W. 79; Hanson *v.* Hammell, 107 Iowa 171, 77 N. W. 839; Patton *v.* Central Iowa R. Co., 73 Iowa 306, 35 N. W. 149; Yeager *v.* Burlington, etc., R. Co., 93 Iowa 1, 61 N. W. 215.

Kansas.—Kansas, etc., Coal Co. *v.* Chandler, 71 Ark. 518; St. Louis, etc., R. Co. *v.* Morgart (Ark.), 8 S. W. 179.

Kentucky.—Jones *v.* Louisville, etc., R. Co., 95 Ky. 576, 26 S. W. 590.

Louisiana.—Stucke *v.* Orleans R. Co., 50 La. Ann. 172, 23 So. 342.

Maryland.—Heltchen *v.* Chipman, 87 Md. 729, 41 Atl. 65.

Massachusetts.—Bence *v.* New York, etc., R. Co., 181 Mass. 221, 3 R. R. R. 295, 26 Am. & Eng. R. Cas., N. S., 295, 63 N. E. 417; Nye *v.* Dutton, 187 Mass. 549, 73 N. E. 654; Richstain *v.* Washington Mills Co., 157 Mass. 538, 32 N. E. 908; Rooney *v.* Sewell, etc., Co., 161 Mass. 153, 36 N. E. 789; Sullivan *v.* India Mfg. Co., 113 Mass. 396; Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654.

Note

Michigan.—*Balle v. Detroit Leather Co.*, 73 Mich. 158, 41 N. W. 216; *Davis v. Port Huron, etc., Co.*, 126 Mich. 429, 85 N. W. 1125.

Minnesota.—*Manley v. Minneapolis Paint Co.*, 76 Minn. 169, 78 N. W. 1050; *Nelson v. Kelsco*, 91 Minn. 77, 97 N. W. 459; *Saxton v. North-western, etc., Co.*, 81 Minn. 314, 84 N. W. 109; *Truntle v. North Star Woolen-Mill Co.*, 57 Minn. 52, 58 N. W. 832; *Wendler v. Red Wing Gas, etc., Co.*, 92 Minn. 122, 99 N. W. 625.

Missouri.—*Bair v. Heibel*, 103 Mo. App. 621; *Herbert v. Mound City, etc., Co.*, 90 Mo. App. 305; *Hill v. Myer Bros. Drug Co.*, 140 Mo. 433, 41 S. E. 909.

New Hampshire.—*St. Jean v. Tolles, etc., Co.*, 72 N. H. 587; *Thompkins v. Maine Engine, etc., Co.*, 70 N. J. L. 330.

New York.—*McGovern v. Cent. Vt. R. Co.*, 6 N. Y. Supp. 838; *McManus v. Davitt*, 94 N. Y. App. Div. 481.

North Carolina.—*Kiser v. Hot Springs Barytes Co.*, 131 N. Car. 595.

Ohio.—*Connell v. Miller, etc., Co.*, 10 Ohio Dec. 129.

Oregon.—*Wagner v. Portland*, 40 Ore. 392.

Pennsylvania.—*Lehigh, etc., Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387.

Texas.—*Ladonia Cotton Oil Cq. v. Shaw*, 27 Tex. Civ. App. 65, 65 S. W. 693.

Vermont.—*Bairnard v. Van Dyke*, 71 Vt. 359.

Wisconsin.—*Kath v. Wisconsin Cent. R. Co.*, 121 Wis. 503, 99 N. W. 217.

Observing Others Operate Machine.—Where a servant has actually operated and seen others operate an implement or machine often enough to enable him by the exercise of ordinary intelligence and care to learn how to avoid how to be injured by it, or where the mode of operating it is so simple that a person of ordinary intelligence or care can at once perceive the safe and proper mode of operating it, there is no duty resting upon the master to instruct him. So held in *Jones v. Louisville, etc., R. Co.*, 95 Ky. 576, 26 S. W. 590.

How to Mount Moving Cars—Knowledge from Observation.—A railroad company is under no obligation to instruct one who begins his first work as brakeman with it how to mount moving cars or point out the dangers incident to such process, when he knew by observation the manner of mounting and the dangers attending it. *Yeager v. Burlington, etc., R. Co.*, 93 Iowa 1, 61 N. W. 215.

Foreign Car with Double Deadwoods—Absence of Express Notification.—In *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791, it appeared that a switchman had his hand crushed while coupling a freight car furnished with double deadwoods and received from another road. He had not been expressly notified that he would be required to handle such cars, but in the course of commerce and as a matter of business necessity as well as of statutory obligation they were being constantly received and forwarded like all other cars adapted to the gauge of the road, and having occasion to run thereon.

Note

It was held that it was not negligence to omit to notify him that such cars had been received.

Coupling Cars—Double Deadwoods—Danger Recognized.—In *Fenton v. Duluth, etc., R. Co.*, 108 Mich. 284, 66 N. W. 51, it is held that where, in an action against a railroad by its brakeman for injuries received while attempting to couple cars supplied with double deadwoods, it appears from plaintiff's own testimony that he saw and recognized the danger, and attempted to couple the cars in a manner in which he claims it should be done, it cannot be said that the accident happened by reason of defendant's failure to instruct him how to perform such service.

Bridge—Repairs—Knowledge—Excessive Speed.—In *St. Louis, etc., R. Co. v. Morgart (Ark.)*, 8 S. W. 179, it appeared that the accident occurred while deceased, the conductor of the train, was running it at excessive speed over a bridge which was being repaired, when the bridge gave away. It was held that the company was not negligent in failing to give the trainmen notice of the condition of the track, since the conductor knew that the repairs were being made, and the "slow boards" were out.

Car on Repair Track—Defects—Switchman Chargeable with Notice.—In *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 307, 96 Fed. Rep. 713, it is held that where it was a part of the regular duties of a switchman to handle defective cars, which were taken from trains and placed upon special side tracks used for such purpose, the mere presence of a car on such tracks was notice to him that it was probably defective, which cast upon him the risk in handling it, and the duty of examining it for the particular defect, although sound cars, improperly loaded, were sometimes placed upon such tracks.

Duty to Handle Defective Cars—Not Required to Notify as to Each Particular Defect.—In *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 307, 96 Fed. Rep. 713, it is held that where a servant has notice of the general risks and dangers of his employment, such as that many of the cars he is required to handle as a switchman are defective, the railroad is not guilty of negligence in failing to notify him of each particular defect, as such duty, if required, devolves upon his fellow servants.

Brakeman Moving Cars to Repair Track—Broken Brake.—In *Yeaton v. Boston & L. R. Corp.*, 135 Mass. 418, it appeared that A., a man forty-five years of age, entered the employ of a railroad as a brakeman, having previously had some experience in that kind of work. He was placed at work in the railroad's yard upon a switching engine. He, with others, was in the habit of taking cars which were damaged and putting them upon a certain track in the yard two or three times a week. After working a few weeks, he was injured by reason of a broken brake of a car. Whenever there had been damaged cars to be moved, during his employment, his attention had been called to the fact by the yardmaster, who usually told the men that the cars had been damaged, and that he wanted them put on a track indicated.

Note

They could generally tell a damaged car by its appearance. A. was sometimes accustomed to examine the cars to see if they had been damaged, and he looked at the car in question, with others, on the day of the accident, but saw nothing out of order about it. It was held that the injury was caused by one of the risks assumed by him in his employment, without having been specially warned as to the condition of such car.

Obstructions Near Track—Engineer's Duty to Inform Switchman.—In Louisville, etc., R. Co. v. Bouldin, 121 Ala. 197, 25 So. 903, it is held that the engineer of a switch engine is not lacking in ordinary care and prudence in failing to warn a switchman of an obstruction near the track, when, from the point of view of the engineer, there is no more than a bare possibility that the switchman would be injured by it, and when the circumstances of the situation of each party reasonably justified the conclusion that the switchman was aware of the presence of the obstruction.

Low Bridges—"Whipping Straps."—In the use of appliances for the protection of its employees when approaching a public road crossing spanned by an overhead bridge, such as "whipping straps," a light on the bridge, etc., the duty and liability of a railroad company are determined by the utility and the usage and custom of well-regulated railroads; and if many railroads abstain from their use, the failure to use them is not negligence, and their use by a majority of railroads does not require all railroads, in the exercise of proper care, to use them. So held in Louisville, etc., R. Co. v. Hall, 87 Ala. 708, 6 So. 277.

Posts Near Track—Duty to Notify Engineer.—In North Birmingham St. R. Co. v. Wright, 130 Ala. 419, it is held that a railroad superintendent or foreman cannot be charged with negligence while in the discharge of his duties of superintendence, in failing to warn an engineer of the location of posts along the line of railroad, when the circumstances would reasonably justify the conclusion that the engineer was aware of the presence of the posts, or when the possibility of injury resulting to the engineer while upon his engine from the proximity of the posts to the track was so remote that it would not occur to a man of ordinary care and prudence to warn him of the location of the posts.

Brakeman Ordered to Attend Switch—Knowledge That Train Was about to Move.—In Greenwald v. Marguette, etc., R. Co., 49 Mich. 197, 13 N. W. 513, it appeared that a boy of about seventeen was employed as a brakeman by the engineer of an ore train, and that he was capable and experienced. The engineer directed the fireman to back the locomotive upon a side track to the train, and told the brakeman to attend a switch. He himself went to attend another switch further on while this was being done the bell and whistle of a train on the main track near by were both sounding. The first switch was passed and the engineer was about throwing the second when he heard an outcry and saw the brakeman under the locomotive. It was proved that the brakeman knew the train was about moving

Note

back; and that there was room enough for him to perform his duties. It was held that he needed no further warning of his danger.

Track Walker Attempting to Cross Bridge after Seeing Approaching Train—Train Signals.—In *Gibson v. Oregon Short Line R. Co.*, 23 Ore. 493, 32 Pac. 295, it is held that where a track walker of defendant, while crossing its bridge, saw an approaching locomotive half a mile away, and thinking he could get across, started to run and fell and hurt his leg, and then stepped on one of the bridge caps placed along the bridge, for that purpose, where he remained in safety, and he had ample time after seeing the train to retreat or step on a cap, he cannot recover on the ground of the insufficiency of the rules of the company to protect track walkers, in not providing for the frequent whistling of engines before approaching bridges.

Engineer's Knowledge That Some One Would Be Sent under Engine in Round House to Make Repairs.—In *Perry v. Old Colony R. Co.*, 164 Mass. 296, 41 N. E. 289, it is held that the fact that the foreman of repairs in the roundhouse of a railroad did not notify the engineer or fireman of an engine, which was stalled in the roundhouse for repairs, that he had sent a laborer under the engine to make some repairs, they knowing that some one would be so sent, and it not being customary to give such notice, or the fact that he did not notify such laborer that the engine would have to be blown down before the repairs were made, and that this was as likely to be done in the roundhouse as elsewhere, the laborer being aware of both of these things, show no negligence on the foreman's part upon which to base an action under a certain employers' liability act for injuries occasioned to the laborer by being scalded with steam and hot water blown from the engine while making the repairs in question.

Hand Car—Dangerous "to Lose Motion of Lever."—In *Jones v. Louisville, etc., R. Co.*, 95 Ky. 576, 26 S. W. 590, it is held that where a railroad section hand while engaged, under the direction of the section boss, in operating a hand car stooped down to throw aside some loose tools on the floor of the car, and in doing so "lost the motion of the lever," and was thrown off of the car and injured, the railroad was not liable on account of the failure of the section boss to instruct him or warn him of the danger, for while he had worked on the road only a few days, and had never before operated a hand car, yet he had seen others do so, and must have known that it was dangerous "to lose the motion of the lever."

A. R. Y.

CENTRAL OF GEORGIA RY. CO. v. BURTON.

(Supreme Court of Alabama, Feb. 10, 1910.)

[51 So. Rep. 643.]

Carriers—Carriage of Goods—Bill of Lading—Construction.—The acceptance of a bill of lading, stipulating that no carrier or party in possession of property should be liable for loss or damage by causes beyond its control or by floods or fire, relieved the carrier from the liability of an insurer, with familiar exceptions, and limited liability to loss or damage by negligence of the carrier.

Carriers—Carriage of Goods—Actions for Loss or Damage—Burden of Proof.*—The burden of proving that a loss or damage to goods in shipment was without fault or negligence of the carrier, so as to exempt it from liability under a stipulation in the bill of lading, is on the carrier.

Carriers—Carriage of Goods—Termination of Relation—Statutory Provisions.—Under Code 1896, § 4224, providing that the relation of common carrier continues in towns or cities of 2,000 population or more and having a daily mail, unless within 24 hours after the arrival of freight notice thereof is given the consignee formally or through the mail, and Code 1907, § 6137, containing the same provision, except that with reference to the population, where the conditions prescribed do not exist, there is no primary duty on defendant to give notice of the arrival of the goods, in order to terminate the strict liability of a carrier, unless a proper custom to the contrary then prevailed at the destination.

Carriers—Carriage of Goods—Termination of Relation—Reasonable Time.†—In the absence of statute or custom, from the arrival of goods at destination on Friday at 3 p. m. to Monday at 1:45 a. m. was not a reasonable time for their removal by the consignee so as to terminate the liability of the carrier as such.

Carriers—Carriage of Goods—Action for Loss and Damage—Question for Jury.—In an action against a carrier for loss of goods by fire after arrival at destination, evidence that there was no fire left in the depot where the goods were, and that the place was fastened up, sufficiently negatived its negligence so as to require the jury's determination of that issue.

Carriers—Carriage of Goods—Termination of Relation—Statutory Provision—Notice of Arrival of Goods.—Code 1896, § 4224, providing that the relation of common carrier continues in towns and cities of 2,000 population or more and having a daily mail unless within 24

*See last foot-note of *Jolliffe v. Northern Pac. R. Co.* (Wash.), 32 R. R. R. 228, 55 Am. & Eng. R. Cas., N. S., 228.

†See last foot-note of *Lewis v. Louisville & N. R. Co.* (Ky.), 33 R. R. R. 134, 56 Am. & Eng. R. Cas., N. S., 134.

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hours after arrival of freight notice is given the consignee formally or through mail, did not, while in force, lay upon the carrier a duty to notify the consignee, but merely determined the time of termination of the strict liability of the carrier.

Carriers—Carriage of Goods—Termination of Relation—Custom.† —A custom of a carrier at the destination of goods to give notice of their arrival did not have the effect of imposing the positive duty to give such notice, but merely affected the time of termination of the liability of the carrier as such.

Appeal from Circuit Court, Chambers County; S. L. Brewer, Judge.

Action by Y. L. Burton against the Central of Georgia Railway Company for destruction of goods by fire. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The facts are sufficiently stated in the opinion of the court. The replications referred to in the opinion are as follows: "(1) That it was the practice of the defendant, and had been for a great many years, to notify the consignee of the arrival of freight in the town of La Fayette, which said practice had become a custom; and plaintiff avers that defendant did not give him any notice of the arrival of the goods mentioned, and he had no notice that they had arrived until after they had been destroyed by fire, and the loss of said goods was caused by the negligence of the defendant in failing to give plaintiff notice of the arrival of said goods. (2) That at the time of the arrival of said goods the town of La Fayette was a town of 2,000 or more population, having a daily mail service, and the plaintiff did not receive any notice of the arrival of said goods, and the loss of said goods was caused by the negligence of the defendant in failing to give plaintiff notice of the arrival of same." These replications were filed to pleas 2 and 3, which in substance allege the provision in the bill of lading as set out in the opinion, that the goods were safely transported to La Fayette, unloaded from the cars, placed in a warehouse, and there held ready for delivery to plaintiff for a reasonable time for the removal thereof, and that said goods were destroyed by fire along with the warehouse.

George P. Harrison and E. M. Oliver, for appellant.
Strother, Hines & Fuller, for appellee.

MCCLELLAN, J. In the bill of lading issued for the consignment for the loss of which by fire, this action was brought, it was stipulated, in consideration of reduction in freight rate, that "no carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto by causes beyond its control; or by floods or by fire.

†See last foot-note of *Illinois Cent. R. Co. v. Hopkinsville Canning Co.* (Ky.), 32 R. R. R. 263, 55 Am. & Eng. R. Cas., N. S., 263.

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* * * " The acceptance of the contract containing that stipulation—the stipulation being valid—operated to relieve the defendant (appellant), as a common carrier, from the exacting liability of an insurer, with familiar exceptions, of the goods, and to limit the liability for loss or damage to the goods while in course of transportation and delivery by the common carrier as such, to negligence of the common carrier, as such, proximately resulting in its loss or damage. That the loss or damage occurring was without fault or negligence of the carrier is matter of exoneration, exceptional, to aver and to sustain which in the proof is the burden of the carrier. These propositions are settled in the following decisions, among others: *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *L. & N. R. R. Co. v. Oden*, 80 Ala. 38; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 537, 29 South. 602; *L. & N. R. R. Co. v. Touart*, 97 Ala. 514, 11 South. 756; *L. & N. R. R. Co. v. Cowherd*, 120 Ala. 51, 23 South. 793; *Grey v. Mobile Trade Co.*, 55 Ala. 387, 28 Am. Rep. 729. See, also, 6 Cyc. pp. 392, 393, and notes. The stipulation involved in *Central of Ga. R. R. v. Merrill*, 153 Ala. 277, 45 South. 628, was against all liability; whereas, the stipulation above quoted particularized certain causes of loss or damage that do not necessarily involve negligence of the carrier. 6 Cyc. *supra*.

When the relation of common carrier, as such, to the consignment ceases, and the relation thereto becomes that of a warehouseman, has been so often stated here as to render restatement at this time entirely unnecessary. In 5 May. Dig. p. 178, and 2 May. Dig. pp. 640-642, may be found many of our decisions announcing the rule.

With reference to the termination of the relation of common carrier, as such, to a consignment, the effect of our statute (Code 1896, § 4224; Code 1907, § 6137) is to divide delivery points into two classes, viz., those without and those within the statute. Under the statute as written in the Code of 1896, the relation of common carrier, as such, continues in towns or cities of 2,000 population or more, and having a daily mail, "unless within twenty-four hours after arrival of such freight notice thereof is given the consignee, formally or through the mail. * * * " In the latter codification (1907) the provision with respect to population is omitted. Otherwise the statute is now the same. The relation of the defendant to the consignment here involved is affected by the former statute. If La Fayette, the point of destination, had the requisite population, and a daily mail, of course the statute applied to continue the relation as common carrier, unless the notice provided for was given. On the other hand, if these conditions to the application of the statute did not exist, then here was no primary duty on the defendant to give notice of the arrival of the goods, with the effect to terminate the exacting liability of a common carrier, unless a proper custom to the

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contrary then prevailed with respect to consignments at La Fayette, Columbus & Western Ry. Co. v. Ludden & Bates, 89 Ala. 612, 7 South. 471. If an effective and applicable custom did not then prevail, the ordinary and often declared rule must be appealed to to determine the question of termination *vel non* of the liability of the carrier as such to these goods. It cannot be held as a matter of law, considering the status as not controlled by the statute mentioned before, that from 3 p. m. Friday to 1:45 a. m. Monday was a reasonable time in which the consignee could have removed these goods. In C. & W. Ry. Co. v. Ludden & Bates, *supra*, "three days" was ruled to have been, in that case, a reasonable time for removal. Here, "three days" did not elapse between the time when the goods were ready for delivery and when they were burned. While not intending to hold inexorably that Sunday may not be computed in determining when the reasonable time for removal of consignments has elapsed, as affecting the termination of the exacting liability of carriers, yet, in this case, in view of the public policy with respect to the Sabbath, read from our statutes on its observation, we do not think the period indicated, including the Sabbath, was reasonable for the removal of these goods, if the statute did not apply. In short, the opinion is entertained that the relation of the defendant to this consignment was that of a common carrier, as such, unless the statute, in this instance, operated; and so, regardless of the alleged custom of giving notice of arrival of shipments at La Fayette. Under this contract of affreightment, assuming that the defendant's liability for the goods was that of a common carrier, and not as warehouseman, the plaintiff could not recover unless negligence of the defendant infected the burning of the goods. As before stated, the burden was on the defendant to allege, and sustain, in the proof, this negation of its negligence. Aside from possible full proof of pleas essentially faulty under the principles before announced, the defendant, by the evidence introduced, undoubtedly so far lifted the burden resting on it to negative its negligence as to require the jury's determination of that issue. It was shown that there was no fire left in the depot, in which these goods were, by defendant's agents from which the fire later occurring could have started. The place was fastened up. The jury's province it was to say whether these precautions met the obligation of ordinary care and prudence resting on the defendant. A detailed discussion of this phase of the case will be omitted since another trial is to be had.

The gist of the replications, as we construe them, is that negligence infected the destruction of these goods, in this, that no notice of their arrival was given the consignee. The replications will be set out in the report of the appeal. Since the action, stated in the Code form (Civil Code, p 1197, form 15), is *ex contractu*, it is a question whether these replications are not a

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departure in afterpleading. This inquiry is not, however, raised or decided. The statute (section 4224, *supra*) was not intended to lay upon the carrier an imperative duty to notify the consignee, in a city or town within its conditions, of the arrival of the consignment. The whole effect and contemplated purpose of the statute was to affect the relation of the carrier to the consignment. The notice therein provided was to prevent the determination of the more exacting liability of the common carrier until the notice stipulated should be given. It was not the intent of the statute to create a substantive duty. It merely and only conditioned the termination of the severer liability upon defined acts. If the carrier desired to continue under the stricter liability, it had the right to do so by omitting to avail itself of the statute's privilege. So much for replication 2.

Replication 1 would ground a breach of duty upon a custom to give the notice described. The pleading must be construed most strongly against the pleader. So viewed, it cannot be held that the custom described had any greater effect than to affect the relation of the carrier to the consignment—to modify the liability from that of common carrier, as such, to that of a warehouseman, if the custom, in respect of notice, was observed; if not observed, that the stricter accountability should continue. Plaintiff's counsel seems to have based both replications upon the principle announced in the line of decisions to which *L. & N. R. Co. v. Gidley*, 119 Ala. 523, 24 South. 753, *A. G. S. R. R. Co. v. Quarles*, 145 Ala. 436, 40 South. 120, and *Alabama & G. S. R. Co. v. Elliott*, 150 Ala. 381, 43 South. 738, 9 L. R. A. (N. S.) 1264, 124 Am. St. Rep. 72, among others, belong. In this line of cases dereliction in some substantive duty concurred with an occurrence, the act of God, for instance—for which the carrier was not accountable—in producing the loss or damage complained of. The principle cannot avail this plaintiff, unless it can be affirmed that a failure to give the notice, sanctioned, it is alleged, by the custom, was a breach of a substantive duty. We have indicated that that view cannot be approved on the pleading here, if at all—an inquiry we are not now invited to decide.

For the error committed in giving the affirmative charge for the plaintiff, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

DOWDELL, C. J., and MAYFIELD and SAYRE, JJ., concur.

GIBSON & DRAUGHN *v.* LITTLE ROCK & H. S. W. RY. CO. *et al.*

(Supreme Court of Arkansas, Jan. 24, 1910.)

[124 S. W. Rep. 1033.]

Carriers—Carriage of Goods—Injury to Goods.—A carrier using a car of a refrigerator company for the transportation of perishable goods is under the same obligation to care for them that it would have been had the car belonged to it, and is liable for a loss caused by negligence in failing to keep the drain holes of the car open.

Carriers—Carriage of Goods—Connecting Carriers.—The Hepburn amendment makes the initial carrier liable for an injury to an interstate shipment, but the connecting carrier is also liable if the injury is the result of its negligence.

Carriers—Carriage of Goods—Connecting Carriers—Presumptions.*—In the absence of proof, it will be presumed that an injury to goods transported by connecting carriers was caused by the last carrier.

Appeal from Circuit Court, Garland County; W. H. Evans, Judge.

Action by Gibson & Draughn against the Little Rock & Hot Springs Western Railway Company and another. From a judgment for defendants, plaintiffs appeal. Reversed and remanded for new trial.

S. W. Leslie, for appellants.

W. E. Hemingway, *E. B. Kinsworthy*, and *Jas. H. Stevenson*, for appellees.

MCCULLOCH, C. J. Plaintiffs Gibson & Draughn instituted this action against the Little Rock & Hot Springs Western Railway Company and the St. Louis, Iron Mountain & Southern Railway Company to recover damages by reason of alleged negligence of said defendants in the transportation of a car load of perishable goods, consisting of oranges and other fruits and vegetables from St. Louis, Mo., to Hot Springs, Ark., over the two roads as connecting carriers. The goods were shipped in a refrigerator car, and negligence of the two defendant railroad companies is alleged in failing to properly ice the car or to care for it in other respects while in transit.

The undisputed facts in the case are that the plaintiffs purchased the goods from a produce dealer in St. Louis, and the goods were loaded in a refrigerator car owned by the American Refrigerator & Transit Company, situated on the tracks of de-

*See second foot-note of *Philadelphia, etc., R. Co. v. Diffendal* (Md.), 32 R. R. R. 364, 55 Am. & Eng. R. Cas., N. S., 364.

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fendant St. Louis, Iron Mountain & Southern Railway Company, and that company issued to plaintiffs a through bill of lading to Hot Springs. No other contract with reference to the transportation and care of the goods is shown in evidence except this bill of lading. The car was transported by the Iron Mountain Road over its line and delivered to the connecting carrier, its codefendant, and by the latter transported to Hot Springs. On arrival there it was found that the holes in one of the bumpers of the car used in draining the car of water from melted ice had become clogged up by trash, so that the water would not run through, and, on account of this obstacle, the water had risen a considerable distance up on the sacks of produce in the car, and it appears that the motion of the car had jolted the water all over the produce, causing same to mold. The goods were badly damaged, and were sold at greatly reduced price. There is no evidence as to the quantity of ice in the car or its temperature, so the proof does not sustain the allegation that the car was not properly iced. The evidence was abundant, however, that the damage was caused by allowing the drain holes in the bumpers to become obstructed. Upon this state of the case, the court gave a peremptory instruction to the jury to return a verdict in favor of defendants, which was done, and the plaintiffs have appealed to this court.

The duty of a carrier of freight with respect to the transportation and handling of perishable goods was fully discussed by this court in the recent case of *St. L., I. M. & S. Ry. Co. v. Renfro*, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58, and the principles which control this case are there announced. After stating in general terms the duty of a carrier with respect to such goods, the opinion reads: "It is the contention of appellant that it discharged its duty to appellees when it furnished a refrigerator car, and that the duty of icing the car, under the evidence, devolved upon the American Refrigerator Transit Company, the owner of the car. The contention is unsound, as shown in *N. Y., P. & N. Ry. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722. It matters not in the case at bar that the refrigerator car belonged to the American Refrigerator Transit Company, an independent contractor. Appellees had no contract with it to furnish cars or to ice them when furnished. Their contract was with appellant to furnish suitable cars; and the evidence was ample to support the verdict that appellant not only undertook to furnish the car, but also to ice the same." In the present case appellees rely upon an alleged distinction between the two cases, in that the evidence in the present one shows that the goods were delivered to the refrigerator company. They rely upon the doctrine announced in some cases that, while it is the duty of the carrier to furnish suitable facilities, yet, where the shipper selects his own vehicle for the shipment of perishable goods, and undertakes to see that the

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same is properly iced, the carrier has a right to assume that this is properly done. There is no question, however, in this case as to the selection of the vehicle or as to any negligence in the furnishing of suitable facilities. It is not contended that there was any defect in the car, nor does the proof show that plaintiffs entered into any contract with the refrigerator company with reference to icing the car and to caring therefor, or entered into any contract except that expressed in the bill of lading. The case of *N. Y. P. & N. Ry. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722, which is a decision of the Virginia Supreme Court of Appeals, and is cited with approval by this court in the Renfroe Case, is almost identical with the present one so far as the question of the carrier's duty to see that the car was properly iced. There the shipper had loaded his fruits into a refrigerator car owned by the refrigerator company, situated on the tracks of the carrier, and the bill of lading was issued by the railway company. The court held that the railway company was liable for damages resulting from the failure to properly ice the car, and in the opinion it is said: "The undertaking of the plaintiff in error (railway company) was to properly care for and safely carry the fruit of the defendant in error, and it is immaterial that the cars in which it was carried were owned by the California Fruit Transportation Company or that such company undertook to ice said cars or to pay for the ice. As between the plaintiff in error and defendant in error, the California Fruit Transportation Company and its employees were the agents of the plaintiff in error. So far as the defendant in error was concerned, the plaintiff in error was under the same obligations to care for the fruit that it would have been had the refrigerator cars belonged to it.

We need not go further than the doctrine here announced to find that the railway company is liable under the proof adduced. While there is no evidence that there was a failure to properly ice the car, as already stated, the evidence abundantly shows that there was negligence in failing to keep the drain holes open.

This was an interstate shipment, and falls within the provision of the act of Congress (Hepburn Amendment) making the initial carrier liable. *St. L. & S. F. R. R. Co. v. Carr*, 124 S. W. —. The connecting carrier is also liable if the damage resulted from its negligence; and, in the absence of proof on the subject, there is a presumption that the last carrier caused the injury. *St. L., I. M. & S. Ry. Co. v. Coolidge*, 73 Ark. 114, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; *K. C. S. Ry. Co. v. Embry*, 76 Ark. 589, 90 S. W. 15; *St. L., I. M. & S. Ry. Co. v. Renfroe*, *supra*.

The court erred in taking the case from the jury by peremptory instruction.

Reversed and remanded for new trial.

WILLIFORD *v.* SOUTHERN RY. CO. *et al.*

(Supreme Court of South Carolina, March 17, 1910.)

[67 S. E. Rep. 302.]

Carriers—Passengers—Existence of Relation.*—Where one having a ticket entitling him to ride as a passenger on the train attempted to board the train on its arrival at the station, he sustained toward the carrier the relation of passenger.

Carriers—Injuries to Passengers—Presumption of Negligence.†—Proof that a passenger was injured through an instrumentality of the carrier raises a presumption of negligence, which continues throughout the trial of the case.

Carriers—Carriage of Passengers—Lights at Stations—Negligence.‡—The failure of a carrier to provide sufficient lights at a station for passengers intending to board a train tends to show actionable negligence.

Carriers—Injuries to Passengers—Negligence.—Where a passenger was injured through an instrumentality of a carrier while attempting to board a train at a station, and the evidence showed a failure to provide suitable lights at the station, and showed that a truck was negligently allowed to remain in front of the waiting room, so as to require the passengers to go nearer the track in passing the corner of the station building where the passenger was injured, there was sufficient evidence of negligence to render the refusal of a directed verdict in favor of the carrier proper.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.—Whether a passenger struck by a part of the engine while attempting to board the train was guilty of contributory negligence held, under the evidence, for the jury.

*For the authorities in this series on the question whether a person may be a passenger before he boards a train or street car, see first foot-note of *Payne v. Springfield St. Ry. Co.* (Mass.), 33 R. R. R. 186, 56 Am. & Eng. R. Cas., N. S., 186; foot-note of *Keifner v. Pittsburgh, etc., Ry. Co.* (Pa.), 32 R. R. R. 220, 55 Am. & Eng. R. Cas., N. S., 220.

†See extensive note, 31 R. R. R. 697, 54 Am. & Eng. R. Cas., N. S., 697; foot-note of *St. Louis, etc., Ry. Co. v. Stell* (Ark.), 31 R. R. R. 426, 54 Am. & Eng. R. Cas., N. S., 426; first foot-note of *Norfolk & W. Ry. Co. v. Rhodes* (Va.), 31 R. R. R. 417, 54 Am. & Eng. R. Cas., N. S., 417; second foot-note of *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346; last foot-note of *Cincinnati Traction Co. v. Leach* (C. C. A.), 32 R. R. R. 193, 55 Am. & Eng. R. Cas., N. S., 193.

‡See *Pere Marquette R. Co. v. Strange* (Ind.), 30 R. R. R. 66, 53 Am. & Eng. R. Cas., N. S., 66; last foot-note of *Wagner v. Atlantic Coast Line R. Co.* (N. Car.), 28 R. R. R. 735, 51 Am. & Eng. R. Cas., N. S., 735.

Williford v. Southern Ry. Co

Appeal from Common Pleas Circuit Court of Fairfield County; J. C. Klugh, Judge.

Action by Addie J. Williford against the Southern Railway Company and another. From a judgment for plaintiff, defendant the Southern Railway Company appeals. Affirmed.

McDonald & McDonald and *Abney & Muller*, for appellant.
Ragsdale & Dixon, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful acts of the defendant. The allegations of the complaint, material to the questions presented by the exceptions, are as follows: "That the plaintiff after purchasing her ticket, waited for several hours, in the waiting room of the defendant's passenger station at Chester, for the defendant's train, upon which she was to take passage, and the said train having been by the carelessness, negligence, and fault of the defendant delayed several hours, did not reach Chester until after dark on the day aforesaid; the said train being scheduled to arrive at Chester at 6:35 p. m. That when the arrival of the said train and its approach at Chester had been signaled by the defendant's agents and servants, the plaintiff, along with other passengers, passed out of the said waiting room to board the said train, but, owing to the narrow space between the station house and track, and owing to the fact that the said agent and defendant W. G. Chitty, who had supervision and charge of said station and its approaches to the train and yards thereabout, had left a truck directly in plaintiff's way, and owing to the entire absence of lights at said station, plaintiff came too near to the track, and was struck by the locomotive or tender of defendant's incoming train, and knocked with great force and violence on the ground. That the defendants were guilty of a gross want of care, and of willful and wanton disregard of their duty to plaintiff, in not providing lights at said station to enable plaintiff to see her way in the darkness, and in carelessly and negligently leaving the said truck in plaintiff's way, taking up thereby nearly all the narrow space between the station house and the track of the defendant, and in carelessly and negligently locating and building its station house in such dangerous proximity to the track as to become a direct and proximate cause of plaintiff's injuries." The defendant denied the allegations of negligence, and set up the defense of contributory negligence. At the close of the plaintiff's testimony the defendant made a motion for nonsuit, which was refused. The defendant also requested his honor the presiding judge to direct the jury to render a verdict in favor of the defendant after the testimony was introduced by both parties, which was likewise refused. The jury rendered a verdict in favor of the plaintiff for \$2,500, and the defendant appealed.

The first exception was abandoned.

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The second exception assigns error on the part of the circuit judge in refusing to direct a verdict, on the ground that there was no testimony tending to show negligence on the part of the defendant. The allegations of the complaint and the uncontradicted testimony show that the plaintiff, at the time of the injury, sustained towards the railroad company the relation of passenger. *Johns v. Railway*, 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709; *Martin v. Railway*, 51 S. C. 150, 28 S. E. 303; *Du Bose v. Railway*, 81 S. C. 271, 62 S. E. 255. She was injured through an instrumentality of the railroad company, and this fact raises a presumption of negligence. *Anderson v. Railway*, 77 S. C. 434, 58 S. E. 149, 122 Am. St. Rep. 591; *Brown v. Railway*, 83 S. C. 53, 64 S. E. 1012. Such presumption continues throughout the trial of the case. *Mack v. Railway*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Ritter v. Railway*, 83 S. C. 213, 65 S. E. 175. There was also testimony to the effect that the defendant railroad company failed to provide suitable lights at said station. The failure to discharge this duty tended to show negligence on the part of the company. *Izlar v. Railway*, 57 S. C. 332, 35 S. E. 583; *Jarrell v. Railway*, 58 S. C. 491, 36 S. E. 910; *Smoak v. Railway*, 65 S. C. 299, 43 S. E. 662. Furthermore, the testimony tended to show that the trucks were negligently allowed to remain in front of the waiting room, in consequence of which she had to go nearer the railroad track in passing the projecting corner of the station building, where she was injured. The exception raising this question is overruled.

The third exception assigns error in refusing to direct a verdict on the ground that the testimony showed contributory negligence on the part of the plaintiff. The appellant relies mainly upon the fact that the engine had a bright headlight when the train ran into the station. The plaintiff testified as follows: "Q. Mrs. Williford, what was the condition of the station outside, and inside, too, for that matter, with respect to the lights? A. The lights were very good on the inside, but none on the outside. Q. None on the outside? A. No, sir; I saw none. It was total darkness. Q. Well, when the train came, what did you do, Mrs. Williford? A. As I came out of the waiting room door, there was a truck right in front of it, so we had to go between the waiting room and the truck; then go up to the office and turned to go up the track. And as I got to that corner, the train rolled in, and the headlight flashed in my face, and I was blinded and couldn't move. Q. And what happened then? A. I was knocked down. Q. By what? A. By the engine, some portion of it, not the front, though. Q. You were knocked by some part of the engine? A. Some part of the engine. The front had passed. Q. If that truck had not been there, will you show me how you could have come to the train? A. I could have come out this way, and then

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gone here (indicating). That would have given me a chance to have seen the engine up the track. Q. You would have been able to see the engine better then than where you were? A. Yes, sir; coming out from behind this office I was blinded, of course. Q. By what? A. By the headlight of the engine. Q. Did the headlight do you any good? Did it give you any light to enable you to see? A. No, sir; I should say it did more harm. Q. Now, you say as a matter of fact you went around the upper side of the truck or the lower side? A. Went around on the lower side where the depot is. Q. That carried you next to that window at the office? A. Yes, sir. Q. And then you had to pass out from the office to the track? A. Yes, sir. Q. Were you, Mrs. Williford, nearer to the track there than you would have been at any other point? A. Just as I turned; yes, sir. Q. That projection is nearer the track than any other part of it? A. Yes, sir." Miss Ethel Halford, a witness for the plaintiff, testified as follows: "Q. What was the condition of the weather, Miss Halford? A. It was raining. Q. With respect to light or darkness what was it? A. On the inside there was light. But there was no light on the outside. Q. There was no light on the outside? A. No, sir; everything was in total darkness on the outside. Q. Was the moon shining? A. No, sir; it was cloudy, misting rain. Q. Well, Miss Halford, do you remember when you came out of the waiting room to take the train? A. Yes, sir. Q. Did you find anything in your way, or not, as you came out? A. Well, there was a truck or something near the door. Q. What happened to Mrs. Williford? A. Well, she was knocked down in some way, and in her falling she fell against me. Q. Miss Halford, do you know how she was hit, and by what—what it was hit her? A. I couldn't say; I don't know. Q. Why was it that you didn't know? A. Well, I couldn't see. Q. You couldn't see? A. I suppose it was some part of the train. Q. You say you couldn't see? A. No, sir." This testimony shows that the question of contributory negligence was properly submitted to the jury.

The last error assigned is because the presiding judge refused to direct a verdict on the ground that the testimony showed that the injury arose from inevitable accident. What has already been said disposes of this question.

Judgment affirmed.

CARTER v. BOSTON & N. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Middlesex, Feb. 23, 1910.)

[91 N. E. Rep. 142.]

Carriers—Injuries to Passenger—Commencement of Relation—Boarding Car.*—Where a car had come to a stop at a usual stopping place in response to plaintiff's signal, and he was in the act of entering it, with his foot on the step, without any objection or warning from the conductor, who was standing in the doorway, when he was injured by the motorman suddenly opening the door further, while defendant claimed that plaintiff attempted to board the car before it came to a full stop and before the conductor had an opportunity to warn him, whether plaintiff had become a passenger at the time he was injured was for the jury.

Carriers—Passengers—Street Railroads—Opening Door.—Where a street car had come to a full stop in response to plaintiff's signal, it was not necessary, to constitute the carrier's assent to plaintiff becoming a passenger, that the car door should be entirely open to permit him to enter.

Carriers—Passengers—Contributory Negligence.—Where a passenger was injured while boarding a street car by placing his hand on the door, which had not been fully opened, he was not guilty of negligence, as a matter of law, in placing his hand on the door, instead of on the handle or rail next to it; he having testified that he believed the door was open and received no warning from the conductor to the contrary.

Carriers—Injuries to Passengers—Duty of Conductor.—Where a street car passenger was injured by placing his hand on the partially open door of the car as he was about to enter it, it could not be ruled, as a matter of law, that the conductor was not bound to warn him against the danger of so doing.

Carriers—Injuries to Passengers—Street Railroads.—Where plaintiff was injured while boarding a street car by his hand coming in contact with the partially open door as it was in the process of opening, and plaintiff's testimony showed that the door came to a stop when nearly open and then started again, a request for a ruling that there was no evidence that the car was of improper construction was properly refused.

Carriers—Street Railroads—Injuries to Passengers—Contributory Negligence.—Where a passenger while boarding a street car was injured by placing his hand on the door as it was opening, the fact that in feeling for the handle plaintiff may have accidentally put his hand on the door before it was entirely open would not constitute contributory negligence if he was in the exercise of due care, and the

*See first foot-note of preceding case.

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injury which he received was due either to the negligent manner in which the door was operated or to a defect in the construction of the car.

Exceptions from Superior Court, Middlesex County; Charles U. Bell, Judge.

Action by George Carter against the Boston & Northern Street Railway Company. Verdict for plaintiff, and defendant brings exceptions. Overruled.

Tort for personal injuries to plaintiff, whose hand was caught in the door of a car of defendant company as he was about to enter the car. The car had stopped, and plaintiff took hold of the hand rail to enter it, when the door, which was operated by the motorman at the other end of the car, suddenly opened farther and plaintiff's hand was caught and injured.

Edward F. McClennen, Austin T. Wright, and Brandeis, Dunbar & Nutter, for plaintiff.

Endicott P. Saltonstall and Sanford H. E. Freund, for defendant.

MORTON, J. This is an action of tort for personal injuries. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding justice to give certain rulings that were requested and to that portion of the charge which left it to the jury to say whether the plaintiff could become a passenger before the door was entirely open. All of the rulings requested except rulings 2, 3 and 5 have been waived. Those are as follows:

(2) "There is no legal duty on the part of a conductor to warn a person intending to take a car not to place his hand upon a door which is in the process of opening." (3) "There is no evidence in this case that the car was of improper design or construction." (5) "If the plaintiff in feeling for the handle of the door before the door was entirely open accidentally put his hand upon the door of the car, thereby catching his finger and causing it to be crushed, he would not be entitled to recover, for there would be no evidence of negligence on the part of the defendant."

We think that the rulings thus requested were rightly refused, and we see no error in the rulings and instructions that were given. It was for the jury to say whether the plaintiff had become a passenger at the time when he was injured. There was evidence tending to show that the car had come to a stop at a usual stopping place, at his signal, and that when the accident occurred he was in the act of entering the car, with his foot upon the step, without any objection or warning from the conductor who was standing in the doorway. This evidence, if believed, warranted a finding that the plaintiff was a passenger when in-

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jured. Evidence introduced by the defendant would warrant the inference that the plaintiff attempted to board the car before it came to a full stop and before the conductor had a chance to warn him; but what the facts were in regard to the matter was plainly for the jury. The plaintiff could not become a passenger without the assent, expressed in some form, of the conductor. Such an assent might be understood from the absence of any objection. It was not necessary to constitute such an assent that the door should be entirely open. It was enough if it was opened so far that the plaintiff was justified in believing that it was intended to afford him an opportunity to enter and no objection was made to his doing so by the conductor. It could not be ruled as matter of law that the plaintiff was not in the exercise of due care in placing his hand upon the door instead of upon the handle or the rail next to it, to assist him in entering, if he believed, as he testified that he did, that the door was open, and he received no warning to the contrary from the conductor. Neither could it be ruled as a general proposition of law that a conductor was not bound to warn a person intending to take a car not to place his hand upon a door that was in the process of opening. If the circumstances were such that a conductor would have reason to apprehend that a person intending to take a car might sustain injury by placing his hand upon a door that was in the process of opening, if not warned, then in the exercise of the degree of care required of him it would be his duty to give such warning. The plaintiff's testimony tended to show that the door came to a stop when nearly open and then started again. This could have been found to be due either to negligence on the part of the motorman who operated the lever which opened and shut the door, or to some defect in the construction of the car. The third request could not therefore have been properly given. The fact that the plaintiff in feeling for the handle may have accidentally put his hand upon the door before it was entirely open would not prevent him from recovering if he was in the exercise of due care and the injury which he received was due to the negligent manner in which the door was operated or to a defect in the construction of the car.

Exceptions overruled.

PINSON v. SOUTHERN RY., CAROLINA DIVISION.

(Supreme Court of South Carolina, March 29, 1910.)

[67 S. W. Rep. 464.]

Trial—Nonsuit—Propriety.—In passing on a motion for nonsuit, testimony must be considered in the light most favorable to plaintiff; and, if there is any testimony which by a reasonable inference will support plaintiff's cause of action, nonsuit is improper.

Carriers—Passengers—Intoxicated Passenger—Care Required.*—The rule as to the care required by a carrier for the protection of an intoxicated passenger does not apply unless the carrier's agents knew, or by proper diligence could have known, of his intoxicated condition.

Carriers—Passengers—Injuries—Liability.—That an employee of defendant railroad company, who was not a member of the crew of the passenger train from which decedent got off, and was not then on duty, and did not know that decedent got off the train, saw him walking on the company's tracks in a drunken condition would not make the company liable for running over decedent; it not being within the scope of such employee's duty to protect him from injury.

Railroads—Injuries to Trespassers—Care Required.†—Where decedent had left defendant's passenger train, and was walking on the track when injured by another train, so as to make him a mere licensee, defendant was only held to ordinary care to prevent injuring him.

Railroads—Equipment—Automatic Air Brakes.—A railroad is not required by any law to equip its freight trains with automatic air brakes.

Railroads—Injuries on Track—Actions—Proximate Cause.—Where a brakeman, after calling to one on the track to get off, did not have time to apply the air brakes to stop the train before the pedestrian was struck, any negligence of the company in not equipping all of its cars with air brakes, so as to permit their application, was not the proximate cause of the injury.

Death—Right of Action.—At common law an administrator had no right of action for intestate's death; the action being purely statutory.

Death—Action—Elements of Damage—Injury to Dead Body.—Un-

*See last foot-note of *Mobile, etc., R. Co. v. Jackson* (Miss.), 30 R. R. R. 120, 53 Am. & Eng. R. Cas., N. S., 120; foot-note of *Chesapeake & O. Ry. Co. v. Crank* (Ky.), 29 R. R. R. 657, 52 Am. & Eng. R. Cas., N. S., 657; *Stringfield v. Louisville Ry. Co.* (Ky.), 29 R. R. R. 648, 52 Am. & Eng. R. Cas., N. S., 648; *Louisville & E. R. Co. v. McNally* (Ky.), 29 R. R. R. 642, 52 Am. & Eng. R. Cas., N. S., 642.

†For the authorities in this series on the subject of the care due from trainmen to licensees and trespassers on railroad tracks, see third foot-note of *Rutherford v. Iowa Cent. Ry. Co.* (Iowa), 32 R. R. R. 647, 55 Am. & Eng. R. Cas., N. S., 647.

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der Civ. Code 1902, §§ 2851, 2852, giving a right of action to the administrator, etc., or death by wrongful act, but limiting recovery to the "injury resulting from the death," no recovery can be had for the negligent or wanton exposure of decedent's dead body.

Appeal from Common Pleas Circuit Court of Cherokee County; R. W. Memminger, Judge.

Action by J. M. Pinson, administrator of Clarence Pinson, against the Southern Railway, Carolina Division. From a judgment of nonsuit, plaintiff appeals. Affirmed.

N. W. Hardin, for appellant.

Sanders & De Pass, for respondent.

HYDRICK, J. The testimony for plaintiff was that, on December 25, 1905, his intestate, Clarence Pinson, boarded defendant's train at Shelby, N. C., and paid his fare to Blacksburg, S. C. He had been drinking, but was not drunk, and seemed to know his business pretty well. He got aboard without assistance, took a seat in the car, and, when the conductor came through collecting fares, paid his own fare and that of a fellow passenger. He was not disorderly, but sat quietly in his seat, and behaved himself so that the fact that he had been drinking was not obvious, though, by looking at him and talking with him one who was acquainted with him could see that he had been drinking. The conductor had no conversation with him. When the train arrived at Blacksburg, about 8 o'clock p. m., it stopped about a quarter of a mile from the station to switch from the main line of the defendant's road to the main line of the Southern Railway Company, and run into the station of the latter company, which was operating defendant's road under lease. The roads cross each other nearly at right-angles. When the train stopped, Pinson got off, and started down the main line of defendant's road, along a path used by the people of the town with the knowledge and acquiescence of defendant. One of defendant's employees, who was not one of the train crew, had gone to meet the train, and was standing near the switch. After the train passed into the switch, he saw Pinson coming towards him "blundering and stumbling" along the track. He called to him several times and asked who he was, but Pinson did not answer. It does not appear that any of the train crew saw Pinson get off, or knew anything of it. At the time he got off there was a freight train, with a passenger coach attached, standing on the main line of defendant's road east of the switch, and headed east. When the passenger train took the switch, this freight train started backward to get west of the switch, so that, when the passenger train had gone into the station and discharged and received its passengers, it could come back on defendant's main line, and proceed east. Between the points where Pinson got off and where the

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freight train was standing there is a very sharp curve in defendant's main line, around the foot of a hill, which shuts off the view of the track for any considerable distance. It was on this curve that the backing freight train struck and killed Pinson. On the back end of the passenger coach, which was attached at the end of the freight train, were two red light markers, one on each side, a red light lantern sitting in the middle of the platform, and a flagman with a white light lantern in his hand, keeping a lookout as the train ran backwards. Before starting the train backward the fireman rang the bell, and the engineer blew the whistle three times. As the train was running backward, at the rate of from 6 to 10 miles an hour, the flagman discovered Pinson, about 30 feet from him, coming along in the middle of the track, meeting the backing train. He had his hands in his pockets, and wore a broad-brimmed hat, which was pulled down over his face, and he seemed to be looking down. As he appeared not to see or hear the train, or to be making any effort to get off the track, the flagman called to him, "Look out!" but Pinson paid no attention. He called again, several times, "Look out! Look out!" but, seeing that Pinson did not heed his warning, he attempted to signal the engineer with his lantern to stop the train; but, on account of the curve and the obstruction of the hill, the engineer could not see the signals. He then ran into the car to put on the automatic air brakes; but, before he got inside the door, the train had struck Pinson. He ran on through the passenger coach to the freight car next to it, but found that there was between that car and the engine a dummy car; that is, one which is not equipped with air brakes. Failing to put on the brakes, he jumped off the train and ran out to where his signals could be seen, and stopped the train, but not until it had passed over Pinson's body, which was badly mutilated. The accident occurred in defendant's yards, where trains were constantly passing, and switching was constantly done. If the train had been fully equipped with air brakes, it could have been stopped within 30 or 40 feet. Pinson's body was left on the track until next day about 10 o'clock. The night was dark, cold, and rainy. If Pinson had been looking, he could have seen the approaching train some distance before the flagman saw him, and in ample time to get off the track; or, if he had heeded the calls of the flagman, he could have gotten off in time to save himself.

The complaint alleges that Pinson's death was caused by the negligent, willful and wanton acts and omissions of defendant: (1) In allowing Pinson to get off the train at a point where passengers are not accustomed to alight, knowing that he was incapable of taking care of himself, and knowing the dangers that beset him, in going from that point along the tracks to the station; (2) in backing its train around said curve, where the hill obstructed the view and prevented the hearing of the approaching train,

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with a dummy coach on the rear end, without lights or brakes, and without ringing the bell or blowing the whistle, and without giving any warning of the approach of the train; (3) in leaving the body on the track for 12 hours, uncovered and exposed to the inclement weather. The answer denied the allegations of negligence, willfulness, and wantonness, and pleaded the contributory negligence of plaintiff's intestate. At the close of plaintiff's testimony the presiding judge, on motion of defendant, granted a nonsuit, on the grounds, (1) that there was no evidence of negligence on the part of the defendant; and (2) because the evidence showed that Pinson was guilty of contributory negligence.

The testimony must be considered in the light most favorable to plaintiff; for, if there is any testimony from which a reasonable inference in support of plaintiff's cause of action can be drawn, the issue must be submitted to the jury. No matter what may be the law as to the degree of care and attention which a carrier should give to a drunken passenger, it has no application unless it appears that the agents and servants of the carrier knew, or by the exercise of proper diligence should have known, of the condition of the passenger. In this case, there is no testimony tending to show that any of the train crew knew, or had any reason to suspect, that Pinson was so drunk that he was incapable of taking care of himself, or that he had gotten off the train where he did. The fact that an employee of defendant happened to be present, and saw Pinson going down the track, apparently in a drunken condition, after the train had passed into the switch, cannot avail the plaintiff. This employee was not on duty, and was not a member of the train crew. It does not appear, therefore, that it was within the scope of his duties to look after Pinson. Besides, it does not appear that he knew that Pinson had gotten off the train, because he did not see him until after the train had passed. Moreover, at that time Pinson had voluntarily severed the relation of passenger, and was only a licensee, and defendant owed him no higher or other duty than any other licensee on its tracks, and that was to exercise reasonable and ordinary care to prevent injury to him.

There is no testimony tending to support any of the specifications of negligence contained in the second ground above set out. The only specification in that ground sustained by the testimony is that there was a dummy car in the train; in other words, that the train was not fully equipped with automatic air brakes. We know of no law which requires that freight trains shall be so equipped. Besides, it cannot reasonably be inferred from the testimony that, if the train had been so equipped, it could have been stopped in time to save the life of Pinson. The testimony is that, if it had been so equipped, it could not have been stopped in less than 30 or 40 feet. Pinson was only 30 feet away from

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it when he was discovered by the flagman. Now, it would have been a most unnatural thing for the flagman, as soon as he discovered Pinson on the track, to attempt to stop the train by applying the air brakes. He did just what common sense and reason would dictate; called to the man to warn him of his danger, supposing, as he had a right to do, that he was in the possession of his faculties, and could hear and would heed the warning. And the testimony shows that, after he had done the very things for which he would have been justly blamed if he had not done first, he thought of and attempted to apply the air brakes, but, before he could get inside the door of the car Pinson was struck. It appears, therefore, that, even if it could be said that there was any negligence in this respect, it was not the proximate cause of the injury.

As to the third ground: At common law the plaintiff would have had no cause of action for the death of his intestate. The cause of action is given by what is known as "Lord Campbell's Act," found, with subsequent amendments, in sections 2851, 2852, vol. 1, Code 1902, in which recovery is limited to the "injury resulting from the death," which would not include injury resulting from the negligent or wanton exposure of the dead body. In *Griffith v. Railroad*, 23 S. C. 25, 55 Am. Rep. 1, it was held that "an administrator has no property in the cadaver of his intestate, and therefore cannot maintain an action for its willful and negligent mutilation."

The views herein announced make it unnecessary to consider the second ground upon which the nonsuit was granted.

Judgment affirmed.

YANCY *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1910.)

[91 N. E. Rep. 202.]

Carriers—Persons Wrongfully on Car.—Plaintiff's presence on defendant's street car was not wrongful, in the sense of an intentional invasion of its possession and control, where, in ignorance of its rule whereby entrance to the car could be had only by the rear right-hand door, and the other door to the rear vestibule was kept locked, she, for the purpose of becoming a passenger, got on the rear left-hand steps leading to such vestibule.

Carriers—Trespassers on Car—Duty Owed by Company.*—That plaintiff was technically a trespasser in getting on the steps leading by the left-hand door to the rear vestibule of defendant's street car, when by its rule that door was kept locked, and entrance could be had only by the right-hand door, did not relieve it of the duty to exercise proper care not to injure her unnecessarily; but it was bound to use reasonable care till at least she had an opportunity to safely step down.

Carriers—Injury to Trespasser on Car—Negligence—Evidence.—Evidence from which it could be found that plaintiff, a woman on crutches, with intention of taking passage on defendant's street car, got on the step leading to the rear vestibule from the left-hand side of the car, in ignorance of defendant's rule by which the door at that side was kept locked, and entrance could be had only by the door at the right-hand side, and there stood with both hands on the grab iron, holding her crutches, and rapping on the door, and asking for admission, and that the conductor shook his head, and at the same time signaled for the car to start, with full knowledge of her situation, though perhaps not fully appreciating her bodily condition, makes the matters of simple negligence and of gross negligence of the conductor questions for the jury.

Street Railroads—Injury to Trespasser on Car—Contributory Negligence.—Plaintiff could not be held guilty of contributory negligence as matter of law, on evidence that she, a woman on crutches, with intention of taking passage on defendant's street car, got on the step leading to the rear vestibule from the left-hand side, in ignorance of defendant's rule by which the door at that side was kept locked, and entrance could be had only by the door at the right-hand side, and there stood with both hands on the grab iron, holding her crutches,

*For the authorities in this series on the subject of the care due trespassers on trains or street cars, see foot-note of *Morris v. Georgia R. R. Co.* (Ga.), 31 R. R. R. 209, 54 Am. & Eng. R. Cas., N. S., 209; second foot-note of *Birmingham, etc., Co. v. Sawyer* (Ala.), 29 R. R. R. 779, 52 Am. & Eng. R. Cas., N. S., 779.

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and rapping on the door, and asking for admission, and that the conductor shook his head, and at the same time gave the starting signal, resulting in her being thrown off.

Trial—Instructions.—It not being claimed by plaintiff that an error of judgment had been made by defendant's conductor in starting the car, but that it was knowingly started without any regard to plaintiff's safety, and defendant's evidence being simply a denial of plaintiff's statement as to the place and cause of the accident, defendant's requested charge that it was not liable for a mere error of judgment of the conductor was properly refused, especially where the jury were plainly told that if the accident happened elsewhere, and under entirely different conditions, as defendant claimed, plaintiff could not recover.

Trial—Instructions—Repetition.—Refusal of requested instructions, fully and accurately covered by instructions given, was not error.

Carriers—Liability for Servant's Gross Negligence.—The conductor, as defendant's servant, being in charge of its street car, it was responsible for his acts, even though constituting gross negligence, in starting the car with a crippled person standing on the step outside the locked door.

Trial—Instructions.—One count of plaintiff's complaint being bottomed on simple negligence of defendant's conductor, and the other, for the same injury, alleging gross negligence of the conductor, it was error for the court, its attention being called by a requested charge to the degree and nature of proof required to sustain the allegations of the second count, not to instruct as to the liability under such count, giving the distinction between simple negligence and gross negligence, leaving them, instead, to infer that plaintiff, if in the exercise of due care, would recover under either count, if the conductor was shown to be negligent.

Exceptions from Superior Court, Suffolk County; Daniel W. Bond, Judge.

Action by Minnie S. Yancy against the Boston Elevated Railway Company. Verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

Defendant's requested instructions, which were refused, are as follows:

- "(1) On all the evidence the plaintiff is not entitled to recover.
- "(2) The plaintiff cannot recover upon the first count in her declaration.
- "(3) The plaintiff cannot recover upon the second count in her declaration.
- "(4) Upon all the evidence the plaintiff was not in the exercise of due care.
- "(5) The plaintiff was not a passenger upon the defendant's car at the time of the accident.

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"(6) The plaintiff was a trespasser upon the defendant's car at the time of the accident.

"(7) The defendant did not owe to the plaintiff that high degree of care it was bound to exercise toward a passenger.

"(8) The defendant is not liable for any acts which do not amount to willful and wanton recklessness towards the plaintiff.

"(9) To establish the degree of negligence on the part of a defendant necessary for the plaintiff to recover, the plaintiff must show intentional, willful wrong. The conduct of the defendant's agent must be criminal or *quasi* criminal. If it results in the death of the injured person, he is guilty of manslaughter.

"(10) The evidence does not show willful and wanton disregard of the plaintiff's rights by the defendant, its agents or servants.

"(12) Even if the conductor did start the car after the plaintiff boarded it, there was no such probability that injury would result to her as to make his act reckless or wanton.

"(13) The defendant is not liable for a mere error of judgment on the part of the conductor."

William H. Sullivan, for plaintiff.

Frederic H. Chase, for defendant.

BRALEY, J. The plaintiff, although a young woman, suffered from permanent lameness, owing to a dislocation of the hip. In walking, to lessen the weight upon this hip where an abscess had formed, she had been provided with crutches at the hospital from which she was returning to her home at the time of the accident. The car she intended to take had stopped, and remained standing at a crosswalk, with the right-hand rear door of the vestibule open on the side next to the street, through which passengers were entering, while the conductor stood on the platform. But the vestibule door next to the double track was closed. If the evidence of the witnesses as to the conductor of the plaintiff, and conductor, cannot be reconciled, the jury could find, from her testimony, that the plaintiff crossed the street in her line of travel with the intention of taking passage, and approaching the car from that side, stood upon the step, with both hands on the grab iron, holding her crutches, and rapped upon the closed door, and asked for admission, but although seen by the conductor he shook his head, and did not open the door. A further finding would have been warranted that, even if seeking to get on from the farther side of the platform, he must have understood she was attempting to board the car for the purpose of becoming a passenger. But while from his uncontradicted evidence it appeared that under a rule of the defendant the left-hand rear door in the direction in which the car moves is always kept closed, and locked, and only the door on the right is used for the entrance and exit of passengers, a momentary mistake as to the method of entrance, of which

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the jury could find she was ignorant, did not make her presence on the car wrongful, in the sense that her act up to the time of refusal was an intentional invasion of its possession and control. *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463. See *Hogner v. Boston Elevated Railway Co.*, 198 Mass. 260, 270, 84 N. E. 464, 15 L. R. A. (N. S.) 960. The fact that the plaintiff technically was a trespasser did not absolutely relieve the defendant of the duty to observe proper care towards her or in exercising its own rights so to act as not to injure her unnecessarily. *Lovett v. Salem & South Danvers Railroads Co.*, 9 Allen, 557, 562. The car had been stopped for the reception of passengers, and if it were found that the defendant's servant knew not only of her presence, but of her evident purpose, the defendant owed the plaintiff the duty of exercising reasonable care until at least an opportunity had been given in which she might safely step down. *Aiken v. Holyoke Street Railway Co.*, 184 Mass. 269, 68 N. E. 238; *Robertson v. Boston & Northern Street Railway Co.*, 190 Mass. 108, 76 N. E. 513, 3 L. R. A. (N. S.) 588, 112 Am. St. Rep. 314; *Hogner v. Boston Elevated Railway Co.*, 198 Mass. 260, 270, 84 N. E. 464, 15 L. R. A. (N. S.) 960; *Dale v. Brooklyn City, Hunter's Point & Prospect Park R. R. Co.*, 1 Hun. (N. Y.) 146; s. c., 60 N. Y. 638; *Donovan v. Hartford Street Railway Co.*, 65 Conn. 101, 32 Atl. 350, 29 L. R. A. 297; *Kelly v. Consolidated Traction Co.*, 62 N. J. Law, 514, 516, 41 Atl. 686. In the description of what followed, if the jury believed the plaintiff, the conductor simultaneously with nodding his head started the car, causing her to be carried a short distance, when being unable to retain her footing she fell off into the street. It was properly left to the jury to decide whether the conductor was so negligent as to make the defendant liable. Nor could it have been rightly ruled, as matter of law, that the plaintiff was careless. It could not have been reasonably anticipated that under such conditions the car would be instantly set in motion. Upon discovery that she had made a mistake when the door was not opened, it could be found that she might assume that the conductor knowing her perilous position would not immediately give the signal to start, but would allow her time to step off. The defendant's requests for rulings, with the exception of the first and second, make no reference to the different counts. The first count does not allege the plaintiff to have been a passenger, but charges the defendant with negligence in the management of the car; and the evidence being applicable to that count no error appears in the refusal to give the defendant's first, second, fourth, sixth, and twelfth requests. Nor should the thirteenth request have been granted. It was not claimed by the plaintiff that an error of judgment had been made in starting the car, but that it was knowingly started with a disregard to her safety, and the defendant's evidence was

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simply a denial of the plaintiff's statement as to the place and cause of the accident. Besides, the jury were plainly told that if it happened elsewhere, and under entirely different conditions, as the defendant contended, the plaintiff could not recover.

The fifth and seventh requests, while correctly stating the law, were fully and accurately covered by the instruction. *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416.

The second count alleged gross negligence of the defendant's servants, and the defendant excepted to the refusal to give the third, ninth, tenth and twelfth requests, that there could be no recovery on this count. We have said there was evidence for the jury of the defendant's negligence, and a further inference of fact could have been drawn by them, that the conductor, with full knowledge of the situation of the plaintiff, although he might not have fully appreciated her bodily infirmities, gave her no opportunity to alight. The use of unreasonable force, where under the circumstances life or limb may be endangered, can be found to be willful or reckless or wanton. A trespass even cannot be willfully molested, and dealt with to his harm and injury. *Planz v. Boston & Albany Railroad Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835. The conductor, as the defendant's servant, was in charge of the car, and the defendant was responsible for his acts. *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171; *Young v. South Boston Ice Co.*, 150 Mass. 527, 528, 23 N. E. 326. To deliberately and without warning start the car at a speed which the jury might find would compel the plaintiff in her crippled condition to fall into the street while it was in motion, resulting perhaps in loss of life itself, the jury could say constituted such a disregard of consequences, which reasonably should have been anticipated, as to willful conduct. *Gordon v. West End Street Railway Co.*, 175 Mass. 181, 55 N. E. 990; *Banks v. Braman*, 188 Mass. 367, 74 N. E. 594; *Aiken v. Holyoke Street Railway Co.*, 184 Mass. 269, 68 N. E. 238; *Black v. New York, New Haven & Hartford Railroad Co.*, 193 Mass. 448, 452, 79 N. E. 797, 7 L. R. A. (N. S.) 148. See *Spooner v. Old Colony Street Railway Co.*, 190 Mass. 132, 76 N. E. 660. The denial of the third, tenth and twelfth requests afforded no ground of exception.

By the eighth and ninth requests the attention of the court was directed to the degree, and nature of proof required to sustain the allegations of the second count. If not called upon to instruct in the language requested, appropriate instructions as to the liability of the defendant under this count were necessary to a correct understanding by the jury of the issue. In the charge no reference whatever is found to the distinction under our decisions between negligence as ordinarily defined, and the willful misconduct which the plaintiff claimed. *Black v. New York, New Haven & Hartford Railroad Co.*, 193 Mass. 448, 452, 79 N. E. 797, 7 L. R. A. (N. S.) 148. The counts are not defective as each states a good

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cause of action, and the verdict being general there is no means of knowing on which one the jury found the defendant liable, and assessed damages. *James v. Boston Elevated Railway Co.*, 201 Mass. 263, 265, 87 N. E. 474. The jury, to the defendant's prejudice, having been improperly left to infer that the plaintiff if in the exercise of due care could recover if the recover if the conductor was shown to have been merely negligent, the exceptions to the refusal to give this request must be sustained. *Bride v. Clark*, 161 Mass. 130, 36 N. E. 745.

We do not find it necessary to consider the exceptions to the instructions dealing with portions of the testimony, or to the refusal to give certain instructions asked for at the close of the charge. The questions presented may not arise at the second trial, or, if raised, may assume an entirely different aspect.

Exceptions sustained.

DAVIS v. IOWA CENT. RY. CO.

(Supreme Court of Iowa, Feb. 16, 1910.)

[124 N. W. Rep. 753.]

Carriers—Injuries to Passengers—Contributory Negligence.—

Where passengers were without objection generally permitted to use as a smoking room the baggage compartment of a combination coach, consisting of one compartment supplied with seats for passengers and another compartment used for baggage, the permission amounted to an implied invitation to so use it, and a passenger so using it was not as a matter of law guilty of contributory negligence.

Carriers—Injuries to Passengers—Contributory Negligence.—

Whether a passenger injured while in the baggage compartment of a combination coach was guilty of contributory negligence held, under the evidence, for the jury.

Appeal from District Court, Mahaska County; K. E. Wilcockson, Judge.

Suit to recover damages for a personal injury. There was a directed verdict for the defendant, and from a judgment thereon the plaintiff appeals. Reversed.

John F. and Wm. R. Lacey, for appellant.

George W. Seavers, W. H. Bremner, and John O. Malcolm, for appellee.

SHERWIN, J. The plaintiff was a passenger on one of the defendant's trains which consisted of freight cars and a combination coach for passengers, trainmen, and baggage. The combination

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coach was in two compartments, one of which was supplied with seats for passengers, and the other was used for baggage, etc. There were several other passengers on the train at the time, and among the number were two ladies and a baby. The train became stalled in the snow, and remained there some time. The conductor and another trainman left the coach, stating as they did so that they were going to help shovel the snow away so that the train could be moved. As they left the coach, the plaintiff and two or three other men went into the baggage room for the purpose of smoking. They had been there 15 or 20 minutes, when a violent and sudden movement of the combination coach inflicted the injuries complained of. A verdict was directed on the ground that the plaintiff was guilty of contributory negligence, and that is the only question argued by the appellee.

There was testimony tending to show that, while the car was thus standing, the plaintiff urinated from one of the side doors thereof, and that just as he turned to leave the door the collision occurred that caused his injuries. There was also evidence tending to show that the baggage compartment of these combination coaches was commonly used by the passengers on the defendant's trains for smoking purposes, and that such use was known to the defendant's employees in charge of its said trains and acquiesced in by them. It was also shown that the conductor of the train in question knew that the plaintiff and other passengers were in the baggage room when he left the coach just before the accident. If it be true that passengers were generally permitted to use the baggage compartment as a smoking room without objection on the part of the defendant, such permission would amount to an implied invitation to so use it, and under such circumstances it should not be said as a matter of law that the plaintiff was at the time in question guilty of contributory negligence. *Sutherland v. Insurance Co.*, 87 Iowa, 505, 54 N. W. 453; *Blake v. Railway Co.*, 89 Iowa, 8, 56 N. W. 405, 21 L. R. A. 559; *Quackenbush v. Railway Co.*, 73 Iowa, 458, 35 N. W. 523; *Fitch v. Traction Co.*, 124 Iowa, 665, 100 N. W. 618; *Jacobus v. Railway Co.*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360; *Dunn v. Railway*, 58 Me. 187, 4 Am. Rep. 267. It is said that the plaintiff was negligent in his use of the side door; but the evidence tends to show that he had at the time attended to the call and turned away from the door. In any view which may be taken of the case, we think the question of contributory negligence was for the jury. The judgment is therefore reversed.

Reversed.

LOUISVILLE & N. R. CO. *v.* TURNER.

(Court of Appeals of Kentucky, March 18, 1910.)

[126 S. W. Rep. 372.]

Carriers—Carriage of Passengers—Performance of Duties.—A carrier maintaining water-closets on its trains and at a station performs its duty in that respect at that station, and it need not anticipate that a passenger will jump from a train at dark and wander about the premises at the station to a place not ordinarily used by passengers for the purpose of responding to a call of nature.

Carriers—Regulations of Trains—Reasonableness.—A rule prohibiting the opening of water-closets on trains at stations is reasonable.

Carriers—Passengers—Depot Premises.—Where there is a customary use by passengers of depot premises in going to and from trains, the carrier must protect passengers from pitfalls near to the pathways by lights or barriers.

Carriers—Passengers—Depot Premises.—A passenger while waiting for the departure of the train at night found it necessary to respond to a call of nature and found the closet on the train closed. The conductor refused to open it, and informed the passenger that the train left in six minutes, and on the statement of the passenger that he did not have time to hunt up a closet, and that he did not want to miss the train, the conductor told him to jump from the train anywhere in the dark. The passenger alighted and went about 25 feet from the train and fell into an unguarded culvert. The carrier maintained a closet at the station. It was not necessary or customary for passengers to use the depot grounds where the culvert was located. Held, that the carrier was not liable for the injuries, since the direction of the conductor was not an implied assurance that the passenger would find the premises safe.

Nunn, C. J., dissenting.

Appeal from Circuit Court, Whitley County.

"To be officially reported."

Action by R. S. Turner against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

J. W. Alcorn, H. H. Tye, Chas. H. Moorman, and Benjamin D. Warfield, for appellant.

Sam C. Hardin, C. C. Williams, and J. N. Sharp, for appellee.

CLAY, C. In this action R. S. Turner sued the appellant, Louisville & Nashville Railroad Company, for damages for personal injuries. He recovered a judgment for \$4,000, and the railroad company appeals. Various grounds for reversal are urged, but in

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view of the conclusion of the court, we deem it necessary to consider but the single question whether or not a peremptory instruction should have gone in favor of appellant. The accident occurred in Corbin, Whitley county, Ky. Appellee was a traveling man at the time, and Corbin was situated in the territory assigned to him. He had frequently been to Corbin before. The accident occurred on May 23, 1906, under the following circumstances: Appellee was stopping at one of the hotels in Corbin, and notified the proprietor that he desired to take the train which left for Jellico some time between 2 and 3 o'clock. He was awakened about 25 minutes before the train was due. He reached the station about 15 minutes before the train was scheduled to depart. While waiting for the departure of the train, appellee found it necessary to respond to a call of nature. For that purpose he left the ladies' car and went to the smoker. He tried the door, but found it locked. When he returned to the platform he met the conductor, and asked the latter to let him get into the closet. The conductor walked to the closet and took hold of the knob. He then said, "The closet is locked; I can't let you in." Appellee replied that it was a case of necessity, and that he did not have time to hunt up a closet. The conductor looked at his watch, and said, "You have got six minutes." Appellee said, "I can't make it, then;" that is, that he did not have time to go to any closet off the train. The conductor said, "Well, I can't let you in." Appellee responded, "Well, I don't want to get left; I can't afford to get left here." Whereupon the conductor said, "Just jump down there anywhere in the dark." When this conversation took place the conductor was standing on the platform of the smoker, while appellee was standing on the platform of the ladies' car. On being told by the conductor to jump down anywhere in the dark, appellee got off the platform by the side of the coach. There was at least one light in the coach at the time, and probably two or three. Appellee passed on up along side of the coach, as he claims, for the purpose of reaching a dark place. When he got to where the Pullman car was located he started to sit down. Being afraid that the police would see him, he concluded to move further away. He then went to a point, as he says, about 20 or 25 feet distant from the sleeper. At this point he stooped down. Finding that he was in an uncomfortable position, he moved back a step further, and fell into an open culvert. The distance of the culvert from the track on which the sleeper was standing is variously estimated at from 7 to 25 feet. At the time of the accident there was no light at the culvert; nor was there any fence or railing to prevent a person from falling into it. Appellee was badly injured by the fall. His ankle was broken and split. After the accident he was carried back to the hotel, and went to Knoxville the following morning. Several operations were performed upon him, and finally his leg was amputated. The evidence further shows that

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appellant maintained a water-closet at the station which was located about 75 yards from the station. It was further shown that the closet was from 75 to 150 feet from the point where appellee had his conversation with the conductor. It was also shown that the hotel water-closet was located about 30 yards from the station. Appellee bases his right to recover on the fact that appellant left the culvert open and uncovered, and that its depot grounds were not lighted. It may be conceded that it is the duty of a railroad company to keep its stations, platforms, and approaches thereto, and also those portions of the depot grounds ordinarily used by passengers, in a reasonably safe condition, and to have them reasonably lighted at night. In the case before us there was no proof that it was necessary for passengers to use that portion of the depot grounds near the culvert; nor was there any proof of its customary use by passengers. Furthermore, the railroad company had fulfilled its whole duty when it provided water-closets on the trains and a water-closet at the station. The rule prohibiting the opening of water-closets on trains at stations is a reasonable one. Were it otherwise, the use of such closets while the trains are stopping at stations, by passengers on the various trains, would soon result in a nuisance. It will be observed that the conductor did not direct appellee to jump down anywhere in the dark until after appellee claimed that he did not have time to go to any closet and did not want to get left. Then, taking appellee at his word, the conductor simply told him to jump down anywhere in the dark. Even if this was an implied assurance on the part of the conductor of the safety of the place to which he directed appellee to go, and he had authority to bind the company by such assurance, it is manifest from the language used that the conductor meant for the appellee to jump down by the side of the car upon which he was standing. It was only an implied assurance of the safety of the place to which he directed him to go; it was not an implied assurance that every portion of the depot grounds, whether ordinarily used by passengers or not, was reasonably safe for appellee's purposes. Appellee was not authorized by the direction of the conductor to wander here and there about the depot grounds until he found a place that was altogether suitable for his purposes and satisfactory to himself. He chose to go to a place where it is not shown that any other passengers had gone for like or other purposes. It was not a place where the carrier could anticipate that a passenger would naturally or ordinarily be likely to go.

The case of *Southern Railway Company in Ky. v. Goddard*, 121 Ky. 567, 89 S. W. 675, 28 Ky. Law Rep. 523, does not support appellee's position. In that case the carrier could have anticipated that a shipper would have occasion to go into its yards for the purpose of loading stock. This court, therefore, held that if a ditch is maintained on the premises by the carrier, about or

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near which a shipper, without knowledge of its presence, would have occasion to go in loading his stock on the cars at night, and by reason of the darkness he falls therein and is injured, the carrier should be held liable to him in damages if guilty of negligence in failing to guard the ditch with a barrier or other contrivance to prevent persons from falling therein.

Nor do the facts of this case bring it within the rule announced in *McKone v. Mich. Cent. R. Co.*, 51 Mich. 601, 17 N. W. 74, 47 Am. Rep. 596. In that case, *McKone*, being urged by a call of nature, passed some little distance along the sidewalk, away from the place for passengers to alight. In order to seclude himself from observation and avoid indecent exposure, he stepped from four to eight feet on the railroad's grounds, fell into a deep hole and received injury. The evidence showed that a passage house and privy accommodations had been destroyed by fire. No privy accommodations remained. The spot where plaintiff received his injury had been leveled off and graveled, and left open for use. The company offered it for the use of its patrons, and the grounds were habitually used for all the purposes which are usual in such places. The hole in which plaintiff fell was so situated that those frequenting the place were in danger of getting into it. The same is true of *Cross v. Lake Shore & M. S. R. Co.*, 69 Mich. 363, 37 N. W. 361, 13 Am. St. Rep. 399. There the plaintiff fell into a culvert hole near a diagonal path. The hole was not guarded, nor its presence indicated by any light or other signal. The evidence showed that the diagonal way plaintiff was using when he fell into the hole in question was a public and common way to the knowledge of the railroad company for a considerable length of time. Having become one of the ways recognized by the company and its agents to go to and from the depot, it became their duty to keep it reasonably safe to go and come upon, the same as they would a route which they had actually provided.

We deem it unnecessary to discuss the other cases cited by appellee, but suffice it to say that they all recognize the rule in force everywhere, that where there is a customary use by passengers of the depot premises, with the knowledge or acquiescence of the company, in going to and from trains, it is the duty of the company to protect passengers from pitfalls near to such pathway by lights or sufficient barriers. No such case is here presented. There is some evidence to the effect that a passenger might go near the culvert in question for the purpose of reaching the water-closet. The question, however, must not be determined by what passengers might do. It is the ordinary, natural, and customary use of the portion of the railroad premises other than the depot and the approaches thereto that imposes a liability upon the carrier of passengers to keep such portions of the premises in a reasonably safe condition for the use of passengers. As the rail-

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road company provided water-closets on its trains and also a water-closet reasonably accessible to the station, it could not have anticipated that a passenger, in response to the direction of the conductor to jump down anywhere in the dark, would wander about the premises to a place not ordinarily used by passengers for the purpose of responding to a call of nature. Nor, as said before, was the direction of the conductor an implied assurance that appellee, wherever he might go, would find the premises reasonably safe for his purposes.

For the reasons given, we conclude that the court should have granted the peremptory instruction asked for by appellant.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

NUNN, C. J., dissenting.

CHESAPEAKE & OHIO RY. CO. v. AUSTIN.

(Court of Appeals of Kentucky, March 15, 1910.)

[126 S. W. Rep. 144.]

Carriers—Injuries to Passengers—Actions—Evidence.—In an action for indignities suffered by a passenger at the hands of the conductor, evidence of occurrences between the conductor and other passengers, not overheard by the passenger, was inadmissible.

Carriers—Carriage of Passengers—Insufficient Accommodations.—In an action by a passenger because compelled to ride in a crowded train, the carrier should be permitted to show that it had no notice of any extra travel which would require more than the usual trains, and that the train which it had was sufficient under ordinary circumstances to accommodate all offering to be carried.

Carriers—Carriage of Passengers—White and Colored Passengers.—Under the statute requiring white and colored passengers to be carried separately, a carrier may not require a white person to ride in the colored coach and where it does so it is guilty of an actionable wrong.

Carriers—Obligation of Carriers to Passengers—Duty to Furnish Seats.*—A carrier must furnish seats to passengers, if practicable, and a passenger may refuse to give up his ticket or pay fare if a seat is not furnished, and one who has purchased a ticket of a particular

*See extensive note, 4 R. R. R. 217, 27 Am. & Eng. R. Cas., N. S., 217; see first head-note of *Kalis v. Detroit United Ry.* (Mich.), 32 R. R. R. 565, 55 Am. & Eng. R. Cas., N. S., 565; first head-note of *Lobner v. Metropolitan St. Ry. Co.* (Kan.), 32 R. R. R. 473, 55 Am. & Eng. R. Cas., N. S., 473; extensive note, 4 R. R. R. 486, 27 Am. & Eng. R. Cas., N. S., 486.

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class is entitled to accommodations of that class, but in general a passenger electing to remain on a particular train must accept the reasonable accommodations afforded him on such train, and a carrier must provide its train with coaches reasonably sufficient to carry comfortably as many persons as in the exercise of ordinary care it should reasonably anticipate.

Carriers—Obligations of Carriers—Duty as to Taking up Passengers.—A carrier must stop its train a reasonable time for passengers demanding passage to have a reasonable opportunity to board it, and where a train stopped the reasonable and usual length of time for passengers to board it, and a passenger failed to present himself at the train, he cannot recover for being left at the station, though he failed to present himself by reason of the crowd at the station.

Carriers—Passengers—Breach of Contract—Compelling White Passenger to Ride in Colored Coach.—A white passenger voluntarily riding in the colored coach rather than risk getting a seat in another coach may not recover on account of riding in the colored coach, and, where a passenger was not directed to ride in the colored coach, and remained on the train knowing its crowded condition, he cannot complain where he was furnished such accommodations as could reasonably be furnished.

Damages—Passenger—Breach of Contract—Duty to Prevent or Reduce.†—A passenger must exercise ordinary care to minimize the damages occasioned by the failure of the carrier to furnish reasonable accommodations or failing to stop at a station a reasonable time to enable the passenger to board the train, and he cannot recover for any loss due to his own want of ordinary care.

Appeal from Circuit Court, Shelby County.

"To be officially reported."

Action by Virginia Austin against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Willis & Todd, for appellant.

Scott & Hamilton, for appellee.

HOBSON, J. On August 29, 1907, the Shelbyville Fair was being held. A number of people going to the fair got on the morning Chesapeake & Ohio west-bound train at Lexington; others at Frankfort. The train had the usual coaches, and, when it left Frankfort, it was pretty well filled. When it reached Bagdad, there was a large crowd there to get on, and at Christiansburg another large crowd got on. Bagdad is ten miles from Shelbyville and Christiansburg about eight. Mrs. Virginia Austin was

†See second foot-note of *Campbell v. Seaboard A. L. Ry. (S. Car.)*, 33 R. R. R. 230, 56 Am. & Eng. R. Cas., N. S., 230.

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one of the passengers who got on at Bagdad, having a roundtrip ticket to Shelbyville and return. According to her testimony, when the train pulled into Bagdad, the conductor had his head out of the window of the smoker, and had his coat off, ordering the brakeman to conduct the passengers up to the west end of the coach, which was the end occupied by negroes. The brakeman took them to that end of the coach, and they got on knowing it was a negro coach, but not knowing that there were any negroes in it. There were two men and a negro woman in the coach. She took a seat with a friend of hers near the partition, and the rest of her party also took seats in the coach until the seats were filled. After the train started, the conductor came in. He did not say anything to her. She saw him quarreling with a Mrs. Booth, who had gotten on the train with her, but could not hear what he said. He walked quickly like he was mad. This had no special effect on her. She was not afraid of the conductor. The condition of the seats was filthy with coal soot and cinders, and the floor was covered with spit. She reached Shelbyville without anything further happening, went to the fair, and came back at 6:30 p. m. to take the train at 7. When the train came, she was not near when it stopped there was such a crowd. The brakeman said not to rush on the train that he had plenty of room for everybody. There was an immense crowd, and, before she got near the steps or had an opportunity to get on the train, it pulled out. She and her party then hired a wagon and drove back to Bagdad, 10 miles. The night was cold, although the day had been very hot, and she had no wrap.

On the other hand, the conductor of the day train testified that, when the train reached Bagdad, he was on the platform, and invited the people to get on at the west end of the ladies' coach, while the brakeman invited others to get on at the west end of the combination car; that he had on his cap and summer uniform; that the plaintiff made no complaint to him that day; that most of the passengers who got on where she did passed on through the colored compartment to the rear of the train, that he had no notice before-hand of any special crowd going to Shelbyville on that day, and did the best he could with the crowd; that there was plenty of room in the back cars for the people who got on at Bagdad, not seat room, but standing room; and that he directed the people at Bagdad to pass on back. The testimony for the railway company as to the night train was, in substance, that the train when it reached Shelbyville stopped the usual length of time for passengers to get on; that, when it was supposed that everybody had gotten on who wanted to get on, the train pulled out. The records of the railway company showed that the train stopped there that night six minutes. All the proof showed that there was a very large crowd at the station that night; that several trains were to leave the station; and that people intending to

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take passage on all these trains were crowded upon the grounds. The case was submitted to the jury on practically this proof, and there was a verdict and judgment against the railway company for \$200 in favor of Mrs. Austin. From this judgment the railway company appeals.

The plaintiff testified on the trial that the conductor was drunk or seemed to be drunk. But she did not testify to anything that he said or did, warranting the conclusion that the court properly excluded the evidence. But he allowed a large amount of evidence as to what occurred between the conductor and other passengers. As none of this was heard by the plaintiff and she evidently did not know what was said to the other passengers, all of this evidence should have been excluded. It threw no light on the case of the plaintiff. The conductor was not rude to the plaintiff. There was no improper conduct on his part toward her, and her rights are not affected by the fact, if it is a fact, that in the confusion the conductor said that to other passengers which he ought not to have said. All that was said by the conductor not in the plaintiff's hearing and all that he said unknown to her should have been excluded from the jury. For the same reason what occurred between the conductor and Ben Marshall or R. C. Hieatt before they reached Frankfort should have been excluded. The fact that the conductor's face was red, or that there was a scowl on his face, or that he kept saying, "Tickets, tickets," was incompetent; the conductor being naturally a man of red complexion. On a hot day, with a big crowd to manage, he was not required to look amiable, provided that he did not treat the plaintiff with discourtesy. The court should have permitted the defendant to show that it had no notice of any extra travel between Lexington and Shelbyville on that day which would require more than the usual train, and that the train which it had was sufficient under all ordinary circumstances to accommodate all offering to be carried. He should also have permitted the defendant to show that the usual train had been sufficient to carry all the people hitherto to the Shelbyville Fair, and that they had no reason to anticipate that it would be insufficient on that day.

There was nothing in the evidence to justify an instruction to the jury to find for the plaintiff if the plaintiff was subject to indignities and humiliation at the hands of the defendant's agents in charge of the train; and there was nothing in the evidence to show that it was possible for those in charge of the train to furnish plaintiff a comfortable seat in a first-class car, or that the plaintiff offered herself as a passenger on the train in due time when it reached Shelbyville that night. The undisputed evidence was the plaintiff did not offer herself as a passenger at all. The court properly allowed the plaintiff to recover if she was required to ride in the car set apart for colored passengers. The statute requires white and colored passengers to be carried separately.

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The railroad company has no right to disregard the statute, and, if it requires a white person to ride in the colored car, it is an actionable wrong. We have heretofore held this both as to white and colored passengers. *Quinn, etc., v. L. & N. R. R. Co.*, 98 Ky. 234, 32 S. W. 742, 17 Ky. Law Rep. 811; *Wood, etc., v. L. & N. R. R. Co.*, 101 Ky. 705, 42 S. W. 349, 19 Ky. Law Rep. 924; *L. & E. R. R. Co. v. Vincent*, 96 S. W. 898, 29 Ky. Law Rep. 1049; *Southern R. R. Co. v. Thurman*, 90 S. W. 240, 28 Ky. Law Rep. 699, 2 L. R. A. (N. S.) 1108. There was evidence for the plaintiff to the effect that the train stopped at the station only a second or two, and did not afford her a reasonable opportunity to present herself for carriage.

In 6 Cyc. 582, the rule as to passengers on crowded trains is thus well stated: "The carrier is bound to furnish seats to passengers entitled to transportation, if practicable, and the passenger may refuse to give up his ticket or pay fare if a seat is not furnished. One who has purchased a ticket of a particular class is entitled to accommodations according to his ticket. But, in general, the passenger who elects to remain on a particular train must accept the reasonable accommodations afforded him on such train." In lieu of the instructions which the court gave, the court will, on another trial, instruct the jury in effect as follows:

"(1) It was the duty of the defendant to provide its train in question with coaches reasonably sufficient to seat and carry comfortably as many persons as in the exercise of ordinary care it should reasonably have anticipated would demand to be carried thereon; and if it failed to do this or did not furnish the plaintiff such reasonable accommodations as it reasonably could on said train, or if it required plaintiff to ride in the car set apart for colored people, they should find for her the damages she thereby sustained.

"(2) It was the duty of the defendant to stop its train at Shelbyville a reasonable time for passengers demanding passage to have a reasonable opportunity to get on, and, if it failed to do so and by reason of this plaintiff was left at Shelbyville, the jury should find for her the damages she thereby sustained.

"(3) Unless the jury find as set out in No. 1 or No. 2, they should find for defendant.

"(4) If the jury find for the plaintiff, they should find for her such a sum as will reasonably compensate her for any humiliation of feelings she endured and for any personal discomfort she suffered, or any necessary expense she incurred which was the direct result of defendant's failure as set out in No. 1 or No. 2.

"(5) If the plaintiff voluntarily rode in the colored car, rather than risk getting a seat in one of the other cars, she can recover nothing on account of riding in that car. If she was not directed to ride in the colored car, and remained on the train knowing its crowded condition, she cannot complain if she was furnished

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such accommodations as could reasonably be furnished on it. If the train stopped at Shelbyville the reasonable and usual length of time for passengers to get on and plaintiff failed to present herself at the train, she can recover nothing for being left there, although she failed to so present herself by reason of the crowd at the station."

In cases of this sort, it is incumbent on the plaintiff to exercise ordinary care to minimize the damages. The plaintiff cannot recover for any suffering or loss which was due to her own want of ordinary care.

Judgment reversed and cause remanded for a new trial.

VLAASSERVITCH v. AUGUSTA & A. RY. CO.

(Supreme Court of South Carolina, March 17, 1910.)

[67 S. E. Rep. 306.]

Damages—Punitive Damages—Right—Want of Actual Damages.*

—Punitive damages may be recovered, though no actual damages are sustained.

Carriers—Passengers—Baggage—Jury Question.—In an action involving a question whether a passenger's personal effects is baggage, the court may determine that question if the facts are susceptible of but one inference, but it is for the jury under instructions defining the term "personal baggage" where the facts raise a reasonable doubt.

Appeal and Error—Findings—Conclusiveness.—In a legal action the Supreme Court can only review the facts to determine whether there is any testimony at all to sustain the trial court's findings.

Carriers—Passengers—Refusal to Transport—Punitive Damages.

If a street car company waived its rule prohibiting passengers from bringing large and unwieldy articles into the car by permitting a passenger to bring a graphophone horn into the car with him, it will be liable to punitive damages for afterwards refusing to allow plaintiff to become a passenger with a graphophone horn.

Appeal from Common Pleas Circuit Court of Aiken County.

Action by Nicholas Vlasservitch against the Augusta & Aiken Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 64 S. E. 913.

Boykin Wright, Geo T. Jackson, and J. B. Salley, for appellant.
Davis, Gunter & Gylcs, for respondent.

*For the authorities in this series on the right to recover punitive or exemplary damages, see first head-note of *Louisville & N. R. Co. v. Roth* (Ky.), 32 R. R. R. 610, 55 Am. & Eng. R. Cas., N. S., 610.

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GARY, A. J. This action was commenced in a magistrate's court, for the recovery of actual and punitive damages, alleged to have been sustained by the plaintiff, in consequence of the defendant's refusal to allow him to become a passenger on its trolley car if he insisted upon carrying with him his graphophone horn. The plaintiff on the morning of June 28, 1907, went to defendant's passenger station at Langley, S. C., for the purpose of becoming a passenger on its trolley car to Augusta, Ga. He had with him a graphophone horn about 5 feet long, and from 18 to 24 inches wide across its mouth. At that time there was a rule of the company, providing that "fishing poles, long bars, gas pipe, long-handled shovels, or other articles too long or heavy, to be taken with passenger in car seat, will not be allowed on cars. Under no conditions allow such articles on rear platform. Conductors will please see that this order is rigidly enforced. No exceptions will be made, unless accompanied by written order from this office, and, even in these cases, articles must be laid flat on the floor in the car." The plaintiff testified: "I went to the front platform, to put on the horn. The motorman said to me, I could not put it on. I went to the rear platform and started to board there, but the conductor said, you can get on, but the horn cannot. * * * Q. When you had it in the seat could any one sit by you? A. Yes, sir; a gentleman sat with me coming back."

The graphophone and horn were purchased by the plaintiff individually, for \$50 and \$60 respectfully, for the purpose of furnishing music for dances in the hall, where a club of boys met for amusement, each of whom was to pay \$1 for the music. The plaintiff a few days previously had purchased a similar horn in Augusta, and was taking it back to exchange it for one more suitable for the purposes just mentioned. He was allowed to bring the first horn purchased by him, from Augusta to Langley, without objection on the part of the defendant's agents. When the defendant refused to allow the plaintiff to get aboard its car with his horn, he went to Augusta on the car of the Southern Railway Company, which came along soon thereafter. The car fare was 10 cents more than by the trolley. The plaintiff also claimed that he suffered damages by reason of the fact that he did not reach Langley in time to work in the mill, on account of the gates being closed when he returned. The following statement is set out in the record: "Upon the pleadings and said testimony, the magistrate rendered a verdict in favor of the plaintiff, for the sum of ten cents, being the excess fare which the plaintiff had to pay, from Langley to Augusta, by reason of having to go on the steam car to that place, and also for the sum of one dollar, on account of the failure of the plaintiff, to get back to Langley, in time to get in the gates to his work, for the afternoon of the day in question, and also for the sum of twenty-five dollars punitive damages, making the aggregate verdict in favor of the plaintiff against the

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defendant, for the sum of twenty-six and ten one-hundredths (\$26.10) dollars." On hearing the appeal from the judgment of the magistrate, his honor the circuit judge made an order, which concludes as follows: "I am satisfied that the sum of one dollar and ten cents, for which judgment was given, was special damages and should not have been allowed; therefore the judgment is modified to that extent. I am satisfied that the graphophone horn in question, under the circumstances, was personal baggage, and I so find, and that the refusal and failure of the defendant to transport plaintiff with his baggage, under the circumstances, was a conscious invasion of plaintiff's legal rights, and that the verdict of twenty-five dollars punitive damages is proper. There was also testimony tending to establish waiver. Wherefore it is ordered that the verdict and judgment of the magistrate, except the sum of \$1.10 be, and the same is hereby, affirmed."

The defendant appealed from said order, and the first question presented by the exceptions is, whether there was error on the part of his honor the presiding judge in sustaining the magistrate's judgment for \$25 punitive damages, after reversing the magistrate's judgment for actual damages, for the reason that punitive damages cannot be recovered, unless there are some actual damages on which to base a recovery for punitive damages. This question is ruled by the case of *Doster v. Tel. Co.*, 77 S. C. 56, 57 S. E. 671, affirmed in *Fields v. Cotton Mills*, 77 S. C. 546, 58 S. E. 608, 11 L. R. A. (N. S.) 822, 122 Am. St. Rep. 593.

The next error assigned is because the circuit judge ruled that the graphophone horn in question, under the circumstances, was personal baggage. The term "personal baggage" is a mixed question of law and fact. It is the duty of the presiding judge to define the term; but it is the province of the jury to determine whether an article, under the facts and circumstances of a particular case, comes within the definition. The court, however, may determine such question, when the facts of the case are susceptible of one inference only. But the question must be submitted to the jury (unless a jury trial be waived), when the facts and circumstances of the particular case are such as to raise a reasonable doubt, in the minds of men of ordinary intelligence, whether the article falls within the definition of personal baggage. This is an action at law, and this court has not the power to review the facts, except for the purpose of determining whether there is any testimony whatever to sustain the findings of the circuit judge. *Jenkins v. Ry.*, 73 S. C. 289, 53 S. E. 480. If, therefore, the facts in this case are susceptible of more than one inference, the conclusion of the circuit judge necessarily involves the finding of such facts in favor of the plaintiff, and they cannot be reviewed.

There was testimony tending to show that the horn did not come within the provisions of the rule of the company hereinbefore mentioned, on the ground that it was not "too long or too

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heavy to be taken with passenger to car seat," as the plaintiff testified that he had taken a similar horn to his seat, and that another passenger sat with him in the seat. As stated by the circuit judge there was also testimony tending to establish waiver. As there was testimony tending to show that, under the facts of this case, the horn might reasonably be regarded as personal baggage, the exception assigning error in the ruling of the circuit judge must be overruled.

The last question for consideration is whether there was any testimony tending to show that the refusal of the defendant to transport plaintiff with his baggage was a conscious invasion of the plaintiff's legal rights, entitling him to punitive damages. The testimony as to waiver of the defendant's right to insist upon the rule hereinbefore mentioned tended to establish this fact. If the defendant waived the right to insist upon said rule, and nevertheless refused to allow the plaintiff to become a passenger with his horn, then he was entitled to punitive damages.

It is the judgment of this court that the judgment of the circuit court be affirmed.

MAUMEE VALLEY RYS. & LIGHT CO. v. MONTGOMERY *et al.*

(Supreme Court of Ohio, Feb. 23, 1910.)

[91 N. E. Rep. 181.]

Carriers—Injury to Passenger—Negligence of Lessee Using Tracks.*

—A common carrier, being the owner of its track, is liable to its passenger for an injury received in a collision between its car and the car of another carrying company which it admits to the joint use of its track, though the collision may result wholly from the negligence of the latter company.

Action—Injury to Passenger—Negligence of Lessee Using Tracks—Right to Joint Action.—In such case the liability of the owning company for the breach of its contract of carriage, and that of the other for its negligence, may be enforced in the same action, and the facts should be so determined by interrogatories or special findings that liability for compensation to the injured passenger may ultimately rest upon the company whose negligence occasioned the injury.

Syllabus by the Court.)

Error to Circuit Court, Lucas County.

Action by one Montgomery against the Maumee Valley Railways & Light Company and another. A Common Pleas judgment for the named defendant was reversed by the Circuit Court, and said defendant brings error. Affirmed.

*See first foot-note of *Sanders v. Pennsylvania R. Co.* (Pa.), 33 R. R. 271, 56 Am. & Eng. R. Cas., N. S., 271.

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Montgomery brought suit in the court of common pleas against the Maumee Valley Railways & Light Company and the Toledo Urban & Interurban Railway Company to recover on account of personal injuries sustained by him while a passenger on a car owned by the Maumee Valley Company; the injury being occasioned by a collision between two electric cars, one owned and operated by each of the companies, upon a track owned by the Maumee Company and used by both companies in the operation of their traction cars under a running arrangement which we do not find stated in detail in the record. In his petition the plaintiff charged that both cars were operated negligently, and that that negligence combined to cause the collision in which he was injured. Both companies in their separate answers admitted the joint use of the track owned by the Maumee Company, that a collision between their cars occurred, and that the plaintiff sustained some injuries. Each denied the allegations of negligence against it. On the trial evidence was introduced tending to show negligence of both companies. The jury returned a verdict in favor of Montgomery against the urban and interurban company but in favor of the Maumee Valley Company. Motions for a new trial were filed and overruled, and judgment was entered upon the verdict. On petition in error, as shown by its record, the circuit court reversed the judgment of the court of common pleas for error in refusing to give the following instruction which was requested: "If the jury find from the evidence that the Toledo Urban & Interurban Railway Company ran its car over the tracks of the Maumee Valley Railways & Light Company with the permission or the knowledge of the Maumee Valley Railways & Light Company, then the said the Maumee Valley Railways & Light Company would be responsible for accidents caused to passengers which it itself carries, by the negligence of the servants or agents of the other company so running its cars over its track by its permission or with its knowledge."

The circuit court also specified as error, on account of which it reversed the judgment, the following portions of the instructions given by the common pleas judge to the jury:

"The servants of the Maumee Valley Railways & Light Company, in operating the car upon which plaintiff was riding, were not bound to foresee or anticipate any negligent act on the part of the employees of the car of the Toledo Urban & Interurban Railway Company, and if the jury find that the car of the Maumee Valley Railways & Light Company had come to a stop before the collision, and the jury shall further find that the collision so occurred by reason of a failure on the part of an employee or employees of the Toledo Urban & Interurban Railway Company to use that degree of care which ordinarily prudent persons under like or similar circumstances would have used, then you are in-

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‘structed that your verdict should be in favor of the defendant the Maumee Valley Railways & Light Company.”

“The jury are instructed as a matter of law that in determining your verdict in this case you should not hold the defendant the Maumee Valley Railways & Light Company liable for any acts of negligence which you may find have been committed by the defendant the Toledo Urban & Interurban Railway Company. You should not charge the defendant the Maumee Valley Railways & Light Company in this case with any act or omission or any mistake, which you find from the evidence was committed by the defendant the Toledo Urban & Interurban Railway Company, or its servants.”

The same view of the liabilities of the companies is expressed in other portions of the charge because of which the circuit court reversed the judgment. The circuit court upon reversing the judgment remanded the cause to the court of common pleas for a new trial.

Smith & Baker, for plaintiff in error.

John R. Kelly and *Ashton H. Cobham*, for defendant in error Montgomery.

Lloyd & Rettig and *King, Tracy, Chapman & Welles*, for defendant in error Interurban Company.

SHAUCK, J. (after stating the facts as above). The view which the trial judge consistently presented to the jury, both in giving instructions and refusing instructions requested, was that each of the companies was liable to the plaintiff, Montgomery, if his injury was caused by its negligence or the negligence of its servants, but that neither company was liable on account of the negligence of servants of the other. With respect to the Maumee Company, it is to be observed that it was the carrier of Montgomery at the time of the collision which resulted in his injury, and it was the owner of the track upon which the collision occurred. According to the view which led to the judgment in its favor in the court of common pleas, it is without liability, to its own passenger on account of injuries which he sustained in a collision which resulted wholly from the negligent operation of a car belonging to, and operated by, another carrier which it had admitted to the joint use of its track. That view is not consistent with either the considerations involved or the adjudicated cases. The elements of care involved in the contract of carriage embrace all conditions which affect the passenger's safety. They extend to the permitted use or occupation of the carrier's track, not less distinctly than to the condition of the track, or to the operation of the carrier's own cars. No principle is suggested which would afford immunity to the owning carrier from the liability for the negligence of its licensee in a case of this

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character. That there is no such immunity has been held in numerous cases, among which are: *Railroad Company v. Barron*, 5 Wall. 90, 18 L. Ed. 591; *Delaware, Lackawanna & Western Railroad Company v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214; *Jefferson v. Railway Company*, 117 Wis. 549, 94 N. W. 289; *Pennsylvania Company v. Ellett, Adm'r*, 132 Ill. 654, 24 N. E. 559. The case under consideration, and the cases cited, are quite readily distinguished from those cases in which a company owning a track and leasing it to another company for the exclusive operation of trains and cars thereon itself wholly ceases to operate cars and trains. In such a case the question here presented could not arise.

It is urged upon our attention that the petition does not allege, and the evidence does not tend to show, any act of negligence participated in by both of the companies joined in the action. But the companies voluntarily entered into such relations that the negligence of either might have caused the collision in which Montgomery was injured, or it might have been caused by the negligence of both. It might have resulted from the sole negligence of the Interurban Company with a liability against it upon that ground with a concurrent liability of the Maumee Company because of the breach of its contract of carriage. Such relations are alleged in the pleadings and they appear in the evidence. The original plaintiff was wholly without fault contributing to his injury. His right to recover against one or both of the companies is entirely clear. If the collision resulted solely from the negligence of the Interurban Company, the liability should ultimately fall upon it. But that liability may be enforced in the same action as the liability of the Maumee Company for the breach of its contract. The original plaintiff was obliged neither to waive his right of action against either company, nor to choose at his peril against which company he would bring his action. We are ware of no rule of law which requires several actions to determine the rights and liabilities of the parties in such a case. That they may be determined in one action appears from *Morris v. Woodburn*, 57 Ohio St. 330, 48 N. E. 1097; *Chicago v. Robbins*, 2 Black, 418, 17 L. Ed. 298; *City of Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760.

The original plaintiff, upon the principles already stated, may be entitled to judgment against both companies, though, of course, he is entitled to but one satisfaction. It will be proper upon a retrial of the cause, as it would have been upon the original trial, by special interrogatories to the jury and the action of the court upon its answers thereto, to determine, if such shall appear to be the truth, that the Interurban Company is liable because of its sole negligence, and the Maumee Company because of its breach of contract, the execution to run firstly against the former company, and, if it be not satisfied, then against the latter.

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The circuit court properly reversed the judgment and remanded the cause for a new trial, and its judgment will be affirmed.

Judgment affirmed.

SUMMERS, C. J., and CREW, SPEAR, DAVIS, and PRICE, J. J., concur.

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err. v. STATE OF KANSAS *ex rel.* CARR W. TAYLOR, Attorney for the board of Railroad Commissioners, and C. C. Coleman, Attorney General of the State of Kansas.

(Argued and Submitted November 30, 1909, Decided Feb. 21, 1910.)

[30 Sup. Ct. Rep. 330.]

Constitutional Law—Impairing Contract Obligations—Reserved Right to Amend, Alter, or Repeal.—A charter right held subject to the power of the state to repeal, alter, or amend is not protected by the contract clause of the Federal Constitution against subsequent impairment.

Railroads—State Regulation—Passenger Service.—A state may direct a railway company operating a branch line which, so far as it lies within the state, was built under the authority of a charter from that state, to afford passenger train service between the terminus of such line within the state and the state line, provided that such requirement does not amount to such an arbitrary and unreasonable exercise of power as to cause it to be, in fact, not a regulation, but an infringement upon the right of ownership, or, considering the surrounding circumstances, operate as a direct burden upon interstate commerce.

Constitutional Law—Due Process of Law—Regulating Carriers—Passenger Service.—The duty of a railway company under its charter to furnish passenger service is not so completely discharged by carrying them on a mixed train, as to cause an order of the Kansas railroad commission, compelling passenger train service at a pecuniary loss, to be so arbitrary and unreasonable as to take property without due process of law, although Kansas Laws 1907, chap. 274, as amended by Laws 1909, chap. 190, gives the public the right to travel in the caboose of freight trains, since even this statute recognizes that persons availing themselves of such right are not entitled to ordinary passenger facilities, or to the legal protection ordinarily surrounding passenger traffic.

Constitutional Law—Due Process of Law—Regulating Carriers—Passenger Service.—An order of a state railroad commission directing a railroad company to discharge its corporate duty by operating a passenger train over a branch line between its terminus within the state and the state line is not so arbitrary or unreasonable as to deprive the company of its property without due process of law, because there

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are no facilities at the state line, and no occasion for the termination of the transit at that point.

Commerce—State Regulation—Compelling Passenger Service.*—Interstate commerce is not directly burdened, in violation of the Federal Constitution, by an order of a state railroad commission, directing an interstate railway company to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the state and the point of intersection with the state line, although, to avoid the useless expense of establishing terminal facilities at that point, the passenger service directed by the order must be operated not only to the state line, but some 20 miles beyond, where such facilities do exist.

In error to the Supreme Court of the State of Kansas to review a judgment ordering a peremptory mandamus to compel a railroad company to obey an order of the state railroad commission, requiring passenger train service between the terminus of a branch line within the state and its point of intersection with the state line. Affirmed.

See same case below, 76 Kan. 467, 92 Pac. 606.

The facts are stated in the opinion.

Mr. Balie P. Waggener, for plaintiff in error.

Messrs. Fred S. Jackson and G. F. Grattan, for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court:

This is a writ of error to a judgment of the supreme court of Kansas ordering a peremptory mandamus commanding the Missouri Railway Company to obey an order of the state board of railroad commissioners. The order directed the putting in operation of a passenger train service between Madison, Kansas, and the Missouri-Kansas state line, on what is known as the Madison branch of the Missouri Pacific Railway Company.

The branch road in question lies between Madison, Kansas, and Monteith Junction, Missouri. From Madison to the state line is 89 miles, and from the state line to Monteith Junction is 19 miles, the total distance between the two terminal points being 108 miles. At Monteith Junction the Madison branch intersects with the Joplin line of the Missouri Pacific, by means of which connection is made with Kansas City and other points. There being no terminal facilities at Monteith Junction, the trains operated on the

*For the authorities in this series on the subject of state regulations claimed to interfere with interstate commerce, see second foot-note of *DeRochemont v. New York Cent. & H. R. R.* (N. H.), 32 R. R. R. 285, 55 Am. & Eng. R. Cas., N. S., 285; first foot-note of *Read & Bean v. Southern Ry. Co.* (N. Car.), 31 R. R. R. 352, 54 Am. & Eng. R. Cas., N. S., 352; foot-note of *City Council of Augusta v. Augusta & A. Ry. Co.* (Ga.), 31 R. R. R. 33, 54 Am. & Eng. R. Cas., N. S., 33.

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Madison branch do not remain over at the junction, but run as far as Butler station, 3 miles distant on the Joplin line, where terminal facilities exist.

There are no large towns on the Madison branch, either in Kansas or Missouri, and the country which that branch serves is largely agricultural, Kansas City being the nearest and most natural market for the products of the territory. The greater volume of the passenger travel, however, originating on the Madison branch, does not move to Kansas City by going to Monteith Junction, but leaves the branch at various points between Madison and the state line, at which points the branch crosses various roads, which, generally speaking, run in a northerly or northeasterly direction, affording a means of reaching Kansas City more directly than by going to Monteith and thence *via* the Joplin line to that city. Three of these intersecting roads are operated by the Atchison & Topeka, two by the Missouri, Kansas & Texas, one by the St. Louis & San Francisco, one by the Kansas & Colorado Pacific, and one by the Missouri Pacific. Pleasanton is the last station on the branch in Kansas, and is six miles distant from the state line.

Without clearing up some confusion in the record upon the subject, we take the fact to be as stated by the court below, that the branch between Madison and Monteith Junction, at least, so far as it was constructed within the state of Kansas, was built by a Kansas corporation chartered in 1885, known as the Interstate Railroad Company, and that to aid in the building of the road within the state of Kansas, about \$200,000 was contributed by counties through which the road passed. A construction company did the work, at the contract cost of \$1,095,000, and this sum was paid by the railway company by delivering to the contractors an issue of \$1,622,000 of 6 per cent mortgage bonds. The Interstate Railroad Company, in July, 1890, consolidated with another Kansas corporation known as the St. Louis & Emporia Railway Company, the consolidated company being designated as the Interstate Railway Company. Subsequently, in December, 1890, by authority of a statute of Kansas, the Interstate Railway Company and eleven other Kansas railway corporations were consolidated, the consolidated company being designated as the Kansas & Colorado Pacific Railway Company.

The Missouri Pacific Railway Company is a corporation chartered in Missouri, Kansas, and Nebraska. It owns virtually all the mortgage bonds issued by the Interstate Railroad Company for the construction of the Madison branch and a majority of the stock of that company. Indeed, it is the owner of a majority of the stock and mortgage bonds of all the constituent companies which united in forming the consolidated company known as the Kansas & Colorado Pacific Railway Company, and, as the lessee of the latter company, operates its lines of road, including, of

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course, the Madison branch. It is not questioned that substantially all the equipment used in operating the roads covered by the leases is owned by the Missouri Pacific Railway Company.

In September, 1905, residents along the Madison branch within the state of Kansas filed a petition with the board of railroad commissioners, alleging, in substance, that only a mixed train was furnished for passenger service on the branch, that such service subjected the public to great inconvenience, prevented anything like a regular and timely passenger service, and, besides, was dangerous to those traveling over the road. An order was prayed requiring the Missouri Pacific to operate a regular passenger train over the branch road between Madison and the state line. The evidence introduced before the board is not in the record. After a hearing, the following finding and order were made:

"Now, on this 7th day of December, 1905, after hearing the evidence and argument of counsel, in the above-entitled action, the board finds that during the years 1902 and 1903, when the respondent railway company operated a passenger train on the Madison branch of its line, that the said passenger train was operated at a loss, and there was no testimony introduced at this hearing that the train, if put on as asked for by the petitioners, could be operated at a profit to the respondent company. The board believes that the people along the line of the Madison branch of said company are entitled to better passenger train service than they are now receiving, and it has been represented to the board of officers of said company that the respondent is constructing motor cars for establishment on its branch lines, that can be operated at a much less expense than steam service.

"It is therefore ordered by the board that on or before the first day of May, 1906, a motor passenger car service be put on and operated on said Madison branch, from Madison, Kansas, to the Kansas and Missouri state line, and in the event said railroad company is unable at that time to put on a motor car passenger service, a regular steam passenger train service be forthwith put on and operated."

The road not having obeyed, this proceeding by mandamus was commenced to compel compliance.

Three special defenses were set up in the return to the alternative writ. In the first it was insisted that the branch road was an interstate road and could only be operated as such, and therefore was not subject to the jurisdiction of the railroad commission or the courts of the state of Kansas, and in the second it was claimed that the burden which would be occasioned by compelling the operation of a passenger train service would be confiscatory and in violation of rights protected by the 14th Amendment. The court below, in its opinion, thus, we think, accurately summarized the elaborate averments relating to the two defenses just referred to:

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"To the alternative writ an answer was filed which denies that the company operated the Madison branch as a line of road wholly within the state of Kansas, and alleges that said branch is a part of the Missouri Pacific general system; that defendant maintains terminal facilities for the branch at Butler, Missouri, 20 miles east of the Kansas state line, where the branch connects with the main line of defendant's railroad; that the company has no terminal facilities near the state line within the state of Kansas, and that the branch road cannot be operated as a road within the state of Kansas without such terminal facilities, to maintain which would involve the company in ruinous expense. It also alleges that the order is unreasonable and confiscatory, and that the company cannot comply with it without great financial loss; that the entire revenue of the road within the state of Kansas, including passenger and freight business, is insufficient to meet the expense and cost of operating the road within the state; that from July 1, 1903, to April, 30, 1905, it maintained separate passenger train service upon this branch, but was obliged to abandon the same and return to the mixed passenger and freight service because the total receipts of passenger and freight business during that period proved wholly insufficient to meet the expenses of operation. It further alleges that compliance with the order of the board would compel defendant to divert its revenues from other lines and parts of its system outside the state of Kansas to the maintenance of separate passenger train service in the state, and that the extent of such additional cost would amount to a confiscation of its property."

The third defense set up that the company was diligently endeavoring to perfect a motor car for experimental purposes, that the practical utility of such service on railway tracks was problematical, and that it was the design of the company "to test the practicability of said character of service on its said Madison branch line as soon as the same can be done, and is also its design to furnish said motor car service for separate passenger traffic if the cost of said service can be brought within the passenger service cost of the mixed train service, which it now furnishes, and if said motor car service can be successfully operated from the standpoints of utility and safety and other considerations necessary to be taken into account."

By stipulation a referee was appointed to take evidence and report findings of fact and conclusions of law. The referee transmitted the evidence taken and made lengthy findings of fact, upon which his conclusions of law were stated. Those briefly were that although it might be unreasonable to order a separate passenger train service to be operated on the branch line, viewed as an absolutely independent line, it was not unreasonable to compel the furnishing of such service, viewing the line as a part of the system of the Missouri Pa-

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cific road, and taking into account the possible benefits which might arise to that system. It was, however, concluded that as the branch road was an interstate road, and could only be operated as such, the state was without power to compel the putting in operation of the passenger train service between Madison and the state line, and that the relief prayed for should therefore be refused.

It was recognized by the supreme court of Kansas when it came to consider the report of the referee that the authority which the commission had exerted in making the order took its source in a section of the act of the legislature of Kansas enacted in 1901, and now found in § 5970, General Statutes of Kansas of 1901, the section being as follows:

"Whenever, in the judgment of the railroad commissioners, it shall appear that any railroad corporation or other transportation company fails in any respect or particular to comply with the terms of its charter or the laws of the state, or whenever in their judgment any repairs are necessary upon its road, or any addition to its rolling stock, or any addition to or change of its stations or station houses, or any change in its rates for transporting freight, or any change in the mode of operating its road and conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the public, said commissioners shall inform such corporation of the improvement and changes which they adjudge to be proper, by a notice thereof in writing, to be served by leaving a copy thereof, certified by the commissioner's secretary, with any station agent, clerk, treasurer, or any director of said corporation; and if such orders are not complied with, the said commissioners, upon complaint, shall proceed to enforce the same in accordance with the provisions of this act, as in other cases."

Reviewing the findings and conclusions of the referee, the court held that the referee was wrong in holding that there was a want of power in the commission to make the order, and it was therefore decided that the order was valid and that the duty of the railroad company was to obey it. 76 Kan. 467, 92 Pac. 606.

A brief summary of the questions passed on by the court will serve to an understanding of the assignments of error which we are called upon to consider:

a. The court disposed of certain contentions which would seem to have been raised at the argument concerning the repugnancy to the state Constitution of the law creating the commission and conferring authority upon that body, and heed the objections untenable. As these involved matters of purely state concern, we shall not further refer to them.

b. The court also adversely disposed of a contention based upon the assumption that the railway company had, by its charter, a contract right to regulate the time and manner of operating its

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trains, and hence was not subject to the order which the commission had made. Although such contention did not deny that the charter right relied on was subject to repeal or amendment by the legislature, it was urged that, as the legislature had not expressly amended or repealed the right, such a result should not be made to flow from the section conferring powers upon the commission, as repeals by implication were not favored.

Having thus cleared the way for the graver questions which the case involved, the court came to consider, first, the reasonableness on its face of the order of the commission, viewed in the light of the findings of that body; second, the reasonableness of the order, tested by the findings of the referee and the evidence upon which such findings were based; and third, the validity of the order in view of the power of Congress to regulate interstate commerce, as applied to the nature and character of the road to which the order of the commission was made applicable.

As to the first, although the duty of the company under its charter was referred to and authorities were cited, with evident approval, holding that the obligation to operate a separate passenger train service rested upon a railroad company in the fulfillment of the law of its being, the court did not expressly pass upon that aspect of the case, but held that, as it did not plainly and obviously result upon the face of the findings and order made by the commission, that the service required would be rendered at a pecuniary loss, it could not, in any event, be said that the order was unreasonable on its face. As to the second, considering the inherent and *prima facie* reasonable nature of the service, the performance of which the order commanded, along with the findings of the referee and the evidence, it was held that the unreasonableness of the order had not been established, since, taking all the foregoing into account, it had not been affirmatively proven that any material pecuniary loss would be sustained from rendering the service in question. In reaching this conclusion it was pointed out that, as a result of the state statute, a *prima facie* presumption of reasonableness attached to the order of the commission, and therefore the burden was on the railroad company to overcome this presumption. As to the third contention, it was held that the exertion by the state of its authority to regulate the operation within the state of the road chartered by the state was but the exercise of a lawful state police power which did not impose any direct burden upon interstate commerce, and hence did not conflict with the Constitution of the United States.

The grievances which the railroad company deems it may endure by the enforcement of the order of the commission as commanded by the court are expressed in many assignments of error. To consider them in detail is not essential, as all the complaints which they embrace were embodied in the argument at bar by the counsel for the railway company in the following propositions:

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"First. The order of the board and the mandate of the state court were, in substance and effect, a regulation of commerce among the states, and the court was without power or jurisdiction in the premises.

"Second. The order of the board, on its face, is manifestly unreasonable, and, in the light of the findings of fact, arbitrary, and without the first element of due process of law, and a denial of the equal protection of the law, guaranteed by the Federal Constitution.

"Third. The order and judgment of the state court, on the evidence and facts found, deprived the railroad company of its property without due process of law, and without compensation, and denied to it the equal protection of the law.

"Fourth. The order of the board of railroad commissioners was an usurpation of power by the board, and the construction placed upon the law by the state court impaired the obligation of the contract between the state and the railway company, in violation of the Constitution of the United States, and deprived it of its property without due process of law and without compensation, and denied to it the equal protection of the law."

While it may be that, in some of their aspects, each of the first three propositions involve considerations apparently distinct from the others, as, in substance, the ultimate reasons by which all three are controlled are identical, we consider them together. Before doing so, however, we dispose of the question concerning the alleged impairment of a contract right, protected by the Constitution of the United States, which is formulated in the fourth proposition, by pointing out the twofold contradiction upon which the proposition is based. As it is not denied that the asserted charter right was held subject to the power of the state to repeal, alter, or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 345, 53 L. ed. 530, 542, 29 Sup. Ct. Rep. 370. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter, or amend, and as it is impossible to assume that a legislative act has impaired a contract without, by the same token, declaring that such act has either repealed, altered, or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract. And, of course, this reason is controlling, irrespective of the scope of the alleged charter right, since, whatever be the extent of the right conferred, it was subject to the reserve power.

The court in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep.

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585, 11 A. & E. Ann. Cas. 398, reiterating a doctrine expounded in preceding cases, said (p. 19):

"The elementary proposition that railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly, by the legislative authority, or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Also in the same case, restating a principle previously often announced, it was held (p. 20) that railway property was susceptible of private ownership, and that rights in and to such property securely rested under the constitutional guaranties by which all private property was protected. Pointing out that there was no incompatibility between the two, the truism was reannounced that the right of private ownership was not abridged by subjecting the enjoyment of that right to the power of reasonable regulation, and that such governmental power could not in truth be said to be curtailed because it would not be exerted arbitrarily and unreasonably without impinging on the enduring guaranties by which the Constitution protected property rights.

The Coast Line Case was concerned with the exertion of state power over a matter of state concern. But the same doctrines had been often previously expounded in reference to the power of the United States in dealing with a matter subject to the control of that government. Moreover, in the cases referred to, as the power of the two governments operated in different orbits, it was always recognized that there was no conflict between them, although it was constantly to be observed that, resulting from the paramount operation of the Constitution of the United States, even the lawful powers of a state could not be exerted so as to directly burden interstate commerce.

Coming to apply the principles just stated to the order in question, and considering it generically, it is obvious that it exerted a lawful state power. Its commands were directed to a railroad corporation which, although chartered by other states, was also chartered by Kansas, and concerned the movement of a train on a branch road wholly within the state, which had been built under the authority of a Kansas charter, although the road was being operated by the Missouri Pacific under lease. The act commanded to be done was simply that a passenger train service be operated over the branch line within the state of Kansas. Unless, then, for some reason, not manifested in the order, intrinsically considered, it must be treated as such an arbitrary and unreasonable exercise of power as to cause it to be, in effect, not a regulation, but an infringement upon the right of ownership, or, considering the surrounding circumstances, as operating

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a direct burden upon interstate commerce, it is clear that, within the doctrine previously stated, no error was committed in directing compliance with the order. And this brings us to consider the several reasons relied upon to establish, first, that the order made by the railroad commission was so arbitrary and unreasonable as to cause it to be void for want of power; or, second, that the order was void because its necessary operation was to place a direct burden upon interstate commerce.

1. *The alleged arbitrary and unreasonable character of the order.*

In its principal aspect, this contention is based on the insistence that the order and findings of the commission and the findings of the referee, when elucidated by the proper inferences of fact to be drawn from the evidence, show the service which the order commanded could not be rendered without a pecuniary loss. And this, it is insisted, is the case, not only because of the proof that pecuniary loss would be occasioned by performing the particular service ordered, considering alone the cost of that service and the return from its performance, but also because it is asserted the proof establishes that the earnings from all sources, not only of the branch road, but of all the roads operated by the Missouri Pacific in Kansas, produced no net revenue and left a deficit. It is at once evident that this contention challenges the correctness of the inferences of fact drawn by the court below. They therefore assume that we are not bound by the facts as found by the court below, but must give to the evidence an independent examination for the purpose of passing on the constitutional question presented for decision. But we do not think that the case here presented requires us to consider the issues of fact relied upon, even if it be conceded, for the sake of argument only, that, on a writ of error to a state court, where a particular exertion of state power is assailed as confiscatory, because ordering a service to be rendered for an inadequate return, the proof upon which the claim of confiscation depends would be open for our original consideration, as the essential and only means for properly performing our duty of independently ascertaining whether there had been, as alleged, a violation of the Constitution. We say this because, when the controversy here presented is properly analyzed, the first and pivotal question arising is whether the order complained of did anything more than command the railroad company to perform a service which it was incumbent upon it to perform as the necessary result of the possession and enjoyment of its charter powers, and which it could not refuse to perform as long as the charter powers remained and the obligation which arose from their enjoyment continued to exist. The difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of the corporation by fixing

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them below a proper remunerative standard, and an order compelling a corporation to render a service which it was essentially its duty to perform, was pointed out in *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, *supra*. In that case the order to operate a train for the purpose of making a local connection necessary for the public convenience was upheld, despite the fact that it was conceded that the return from the operation of such train would not be remunerative. Speaking of the distinction between the two, it was said (p. 26):

"This is so [the distinction] because, as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so, as an incident, some pecuniary loss from rendering such service may result. It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not, in and of itself, necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable under the doctrine of *Smyth v. Ames*, 169 U. S. 526, 42 L. ed. 842, 18 Sup. Ct. Rep. 418.

"Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one. As the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance."

Indeed, the principle which was thus applied in the *Atlantic Coast Line Case* had previously, as pointed out in that case, been made the basis of the ruling in *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115. The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the *Atlantic Coast Line Case*, as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that an order compelling the performance of such a duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral; that is, was binding in favor of the corporation as to all rights con-

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ferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road is then the question to be considered.

It may not be doubted that the road, by virtue of the charter under which the branch was built, was obliged to carry passengers and freight, and therefore, as long as it enjoyed its charter rights, was under the inherent obligation to afford a service for the carrying of passengers. In substance, this was all the order commanded, since it was confined to directing that the road put on a train for passenger service. True it is that the road was carrying passengers in a mixed train, that is, by attaching a passenger coach to one of its freight trains. Testing the alleged unreasonableness of the order in the light of the inherent duty resting upon the corporation, it follows that the contention must rest upon the assumption that the discharge of the corporate duty to carry passengers was so completely performed by carrying them on a mixed train as to cause an order directing the running of a passenger train to be so arbitrary and unreasonable as to deprive of rights protected by the Constitution of the United States. But when the necessary result of the contention is thus defined, its want of merit is, we think, self-evident, unless it can be said as a matter of law that there is such an identity as to public convenience, comfort, and safety between travel on a passenger service train and travel on a mixed train,—that is, a train composed of freight cars with a passenger car attached,—as to cause any exertion of legislative authority for the public welfare, based on a distinction between the two, to be repugnant to the Constitution of the United States. The demonstration as to the want of foundation for such a contention might well be left to the consensus of opinion of mankind to the contrary. The unsoundness of the proposition was clearly pointed out by the supreme court of Illinois in *People ex rel. Cantrell v. St. Louis, A. & T. H. R. Co.* 176 Ill. 512, 35 L. R. A. 656, 52 N. E. 292, where it was said:

"Independently of the provisions of the lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carrier of passengers in a car attached to a freight train is a suitable and proper operation of a railroad,

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so far as the carriage of passengers is concerned. The transportation of passengers on a freight train, or on a mixed train, is subordinate to the transportation of freight,—a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train; that is to say, the duty of furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train which shall be run for the purpose of transporting passengers only, and not freight and passengers together."

Even, however, if it be conceded that the reasoning of the case just cited may not be universally applicable, because conditions might exist which, in some cases, might cause a different rule to apply, there is no room for such view in this case. This is so because, as was pointed out by the court below, the statutes of Kansas in force at the time the branch road was incorporated lend cogency to the conclusion that the effect of the acceptance of the charter was to bring the road under the obligation of furnishing passenger service,—a duty which could not be escaped by giving the service only on a mixed train, and thus subjecting passengers to the resulting dangers and inconveniences. Nor do we think there is any force in the argument elaborately pressed, that chapter 274, Kansas Laws of 1907, as amended by chapter 190, Laws of 1909 (which is in the margin),[†] shows that the law of Kansas proceeds on the conception that there is no distinction between a passenger train service and the carriage of passengers on a mixed or freight train. On the contrary, we

[†]Part of Chapter 274, Kansas Laws of 1907, as Amended by Chapter 196, Laws of 1909.

That all freight trains to which caboose is attached shall be obliged to transport, upon the same terms and conditions as passenger trains, all passengers who desire to travel thereon, and who are above the age of fifteen years, and who, if under fifteen years, are accompanied by a parent or guardian, or other competent person, but no freight train shall be required to stop to receive or discharge any passenger at any other point other than where such freight train may stop; nor shall it be necessary to stop the caboose of such trains at the depot to receive and discharge passengers: provided, that on such trains the railroad companies shall only be liable for their gross negligence; and provided further, that this act shall not be construed to apply to freight trains on main lines, the most of which trains shall be composed of cars loaded with live stock.

Any officer or employee of such railroad company, who shall violate any of the provisions or conditions of § 1 of this act, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined in any sum not less than ten nor more than one hundred dollars, or by imprisonment in the county jail for not less than five nor more than thirty days, or by both such fine and imprisonment.

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think the statute referred to sustains the opposite inference, since it recognizes that persons who avail of the right conferred to travel in the caboose of a freight train are not entitled to ordinary passenger facilities or to the legal protection ordinarily surrounding passenger traffic. The first, because the statute provides that persons must get on or off the caboose where the company finds it convenient to place that car, and second, because persons riding in the caboose are afforded redress for injury only where the company is guilty of gross negligence.

The contention that the order is unreasonable in and of itself, irrespective of whether there is profit in the operation of the train service which the order commands to be operated, because it directs the movement of the passenger train directed to be run to the state line, where, it is said, there are no terminal facilities, and no occasion for the termination of the transit, is disposed of by the considerations previously stated. We say this because its unsoundness is demonstrated by the reasoning which has led us to conclude that there was no merit in the contention that the fact of pecuniary loss was of itself alone adequate to show the unreasonableness of the order. This follows from the principle which we have previously expounded, to the effect that the criterion to apply in a case like this is the nature and character of the duty ordered, and not the mere burden which may result from its performance.

2. That the order was void because it operates a direct burden upon interstate commerce.

To support this proposition it is urged that the charter of the Interstate Railroad Company, the builder of the branch, provided for a road not only in Kansas, but to extend into Texas and Missouri, and therefore for an interstate railroad. This being its character, the argument proceeds to assert that the regulation of traffic on the road, whatever be the nature of the traffic, was interstate commerce, and beyond the control of the state of Kansas. But this simply confounds the distinction between state control over local traffic and Federal control over interstate traffic. To sustain the proposition would require it to be held that the total traffic of the road was free from all governmental regulation, unless, at the same time, it were held that the incorporation of the road had operated to extend the powers of the government of the United States to subjects which could not come within the authority of that government consistently with the Constitution of the United States. Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own

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jurisdiction. The charter therefore left the road for which it provided subject, as to its purely local or state business, to the authority of the respective states into which it was contemplated the road should go, and submitted the road as an entirety, so far as its interstate commerce business was concerned, to the controlling power conferred by the Constitution upon the government of the United States.

The contention that a burden was imposed upon interstate commerce by causing the train to stop at the state line, where there were no terminal facilities, but in a disguised form reiterates the complaint which we have already disposed of, that the order, because of the direction to stop at the state line, was so arbitrary and unreasonable as to be void. The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when, in fact, the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation. It is said that, as the state line may be but a mere cornfield, and great expense must result to the railway from establishing necessary terminal facilities in such a place, it must follow that the road, in order to avoid the useless expense, must operate the passenger service directed by the order, not only to the state line, but 20 miles beyond, to Butler, on the Joplin line, where terminal facilities exist. From these assumptions, it is insisted, that the order must be construed according to its necessary effect, and therefore must be treated as imposing a direct burden upon interstate commerce by compelling the operation of the passenger train, not only within the state of Kansas, but beyond its borders. But under the hypothesis upon which the contention rests, the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed. *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121.

Affirmed.

SOUTHERN RY. CO. v. LEWIS.

(Supreme Court of Appeals of Virginia, March 10, 1910.)

[67 S. E. Rep. 357.]

Master and Servant—Injuries to Servant—Care Required of Master.*—The ordinary care which a master is required to exercise to furnish a reasonably safe place to work is to be determined by the general usages of the business.

Master and Servant—Injuries to Servant—Action—Instructions.—In an action for injuries to a brakeman who, while climbing up the side of a car, was injured by being struck by a switch target, the evidence showed that the switch stand was one in common use by defendant and other railroads, and that it was placed, as all such stands were placed by defendant and other railroads, so as to leave a space of two feet between the lamp and the side of any car, and the court instructed that it was the duty of defendant to furnish plaintiff a reasonably safe place for the performance of his duties. Held, that the instruction was erroneous, as leaving out of view the important limitation that the master is only bound to exercise ordinary care for the safety of the servant.

Master and Servant—Injuries to Servant—Instructions.—It was error to instruct that, if the jury believed that plaintiff sustained his injuries while using reasonable care in performance of his duties, and that his injuries resulted from the fact that the switch stand and lamp were placed in too close proximity to the track, they must find for plaintiff, since it left the jury to determine what was "in too close proximity," and they were not told that, if the stand was negligently placed too near or nearer than usual and customary, defendant was liable.

Master and Servant—Injuries to Servant—Instructions.—In an action for injuries to a brakeman who, while climbing up the side of a car, was struck by a switch target, the evidence showed that it was the standard switch stand in common use by defendant and other railroads, and placed at the distance that all such stands were placed by defendant and other railroads, so as to leave a space of two feet between the lamp and the side of a car, and the court refused to instruct that ordinary care is such care as reasonably prudent men exercise in the conduct of a like business, and that if the switch stand was a standard switch stand in common use, and placed no nearer the track than customary, and the car was of the ordinary and usual width, the verdict must be for defendant. Held, that the instruction was warranted by the evidence, and should have been given.

*See extensive note, 18 R. R. R. 326, 41 Am. & Eng. R. Cas., N. S., 326; last foot-note of *Bandekow v. Chicago, etc., Ry. Co. (Wis.)*, 31 R. R. R. 159, 54 Am. & Eng. R. Cas., N. S., 159; first foot-note of *Colorado Midland Ry. Co. v. Brady (Colo.)*, 32 R. R. R. 113, 55 Am. & Eng. R. Cas., N. S., 113.

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Master and Servant—Injuries to Servant—Appliances.†—A master is not required to furnish the servant with the newest and best appliances, and he performs his duty when he furnishes those of ordinary character and reasonable safety.

Master and Servant—Injuries to Servant—Master's Liability.‡—Masters are liable for the consequences, not of danger, but of negligence, and they are not insurers.

Master and Servant—Injuries to Servant—Master's Liability.*—The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.

Master and Servant—Injuries to Servant—Instructions.—In an action for injuries to a brakeman who, while climbing up the side of a car was struck by a switch target, a requested instruction, to the effect that defendant would not be liable if the switch stand was a standard stand, etc., was not erroneous by the use of the word "standard"; the testimony in the case being to the effect that the stand was a standard stand, and one in common use.

Error to Corporation Court of Danville.

Action by W. T. Lewis against the Southern Railway Company. Judgment in favor of plaintiff, and defendant brings error. Reversed.

Wm. Leigh, for plaintiff in error.

B. H. Custer and Peatross & Harris, for defendant in error.

HARRISON, J. This action was brought by W. T. Lewis to recover damages for injuries sustained by him, which he alleges were occasioned by the negligence of the Southern Railway Company. There was a verdict and judgment in favor of the plaintiff which this writ of error brings under review.

It appears that the plaintiff was, at the time of this accident, in the employment of the defendant company as brakeman on its yards at Danville. The crew with which he was working consisting of an engineer, conductor, another brakeman, and himself, were engaged in shifting cars. As one of the cars passed the plaintiff, he caught the grab iron on the side of the car to pull himself up, but before this was accomplished he was, according

†See first foot-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; fourth head-note of *Booth St. Louis, etc., Ry. Co. (Mo.)*, 32 R. R. 119, 55 Am. & Eng. R. Cas., N. S., 119.

‡See first foot-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618; last paragraph of fifth foot-note of *St. Louis, etc., Ry. Co. v. Harmon* (Ark.), 29 R. R. 104, 52 Am. & Eng. R. Cas., N. S., 104; last paragraph of second foot-note of *St. Louis, etc., Ry. Co. v. Inman* (Ark.), 26 R. R. 433, 49 Am. & Eng. R. Cas., N. S., 433; foot-note of *McEwen v. Central of Georgia Ry. Co. (Ga.)*, 26 R. R. 429, 49 Am. & Eng. R. Cas., N. S., 428.

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to his statement, struck on the back or near the side by the switch target, which is the lamp on the switch pole, and knocked off, thereby sustaining the injury complained of. No one saw the accident, and it is by no means clear how it happened. The theory of the defendant is that it resulted from a lack of care on the plaintiff's part. It is not alleged that the train was improperly operated, or that the car on which the plaintiff was riding was out of repair, or of an improper width, or that the switch was out of repair. The sole negligence charged is that the defendant company placed and maintained the switch, which it is alleged struck the plaintiff, too close to its track, and that the switch was too high. The evidence shows that the appliance in question was a "Ramapo" switch stand that was in common use by the defendant and other railroads in their yards; that it was placed seven feet from the center of the track, which was in the distance that all such switches were placed from the track by the defendant and other railroads, leaving a space of two feet between the lamp and the side of the car, which gave a safe and proper clearance for passing trains; that the switch in question was four feet and one inch high, including the lamp or target on top; and that this was the height of all such switches used on yards by the defendant and other railroads. Not only is the switch stand in question shown to be one of a class in common use by the defendant and other roads, and situated at a distance from the track commonly adopted by the defendant and other roads, but it appears that the point of its location was where the greatest amount of work was done on the yards, and that it had been in that location for two years or more without complaint or accident to any one.

Instruction No. 1, given for the plaintiff, tells the jury that it was the duty of the defendant to furnish the plaintiff a reasonably safe place for the performance of his duties. This is true; but as a statement of the law applicable to this case, it is only partially true. It leaves out of view altogether the further important limitation upon the master's duty that he is only bound to exercise ordinary care for the safety of his servant. The instruction as given is well calculated to mislead the jury by conveying to their minds the idea that an absolute duty rested upon the master to furnish a reasonably safe place, whereas his duty was discharged when he had exercised ordinary care to furnish a reasonably safe place. Ordinary care is to be determined by the general usages of the business, but the instruction, as given, leaves the jury without guide to decide what is a reasonably safe place, with no regard to the degree of care that may have been exercised in its selection. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 990; *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk Traction Co. v. Ellington*, 108 Va. 245, 61 S. E. 779. Again, in the latter part of this instruction, the jury are told that, if they believe from the evidence that the plaintiff sustained his injuries

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while using reasonable care in the performance of his duties, and that his injuries resulted from the fact that the switch stand and lamp thereon were placed in too close proximity to the railroad track, they must find for the plaintiff. This leaves the jury to determine what was "in too close proximity." They are not told that if the switch stand and lamp thereon was negligently placed too near, or from lack of ordinary care was placed in too close proximity, or that if they believed it was placed nearer than was usual and customary with the defendant and other railroad companies, the defendant was liable; but they are left to fix their own standard as to how close a switch should be placed to a railroad track. This was error. Juries must determine the responsibility of individual conduct, but they cannot be left, without guide, to fix a standard which, in effect, dictates the customs and usages of business. There can be no liability upon the master unless he is shown to have been negligent. He is responsible for the consequences, not of danger but of negligence. This fundamental prerequisite to any liability is ignored throughout the instruction under consideration, and the defendant is practically made an insurer of its employee, notwithstanding the established fact that it has conducted its business in a manner shown by long experience to be reasonably safe, and has conducted it as others, governed by their experience, have conducted a like business.

Instruction No. 4, asked for by the defendant and refused, was as follows: "The court instructs the jury that ordinary care is such care as reasonably prudent men exercise in the conduct of a like business, and if they believe from the evidence that the switch stand at which the plaintiff was injured was a standard switch stand in common use by the defendant company and by other railway companies; that it was placed no nearer the track of the defendant company than is usual and customary with said defendant company and other railroad companies; that said switch stand was in good order, and the car upon which plaintiff was riding was of the ordinary and usual width of cars used by said defendant company and other companies, and in good order—then they must find for the defendant." This instruction was well warranted under the pleadings and evidence in this case, and should have been given. It tells the jury that, if the defendant had adopted and furnished a switch stand of the character usually used by itself and others in like business, and placed it according to the ordinary usages and practice of the business, it was not liable. As already pointed out, the law only imposes upon the master the duty of using ordinary care to provide the servant with reasonably safe and suitable appliances and instrumentalities for the work to be done. The right of selection among reasonably adequate and safe methods rests with the master. He is not required to furnish the servant with the newest and best appliances. He performs his duty when he furnishes those of ordinary character

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and reasonable safety, and the former is the test of the latter: for in regard to the style of the implement or nature of the mode of performance of any work, "reasonably safe" means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. These principles have been reiterated by this court through a long line of decisions. *Bertha Zinc Co. v. Martin*, *supra*; *Norfolk Traction Co. v. Ellington*, *supra*. Objection is made to this instruction that it uses the term "standard" switch stand. The witness, in speaking of this appliance, says: "These switches are made by the Ramapo people with their standard length rods, and those same length rods are used on other roads." It is not perceived how the use of the term "standard" in speaking of the switch could possibly have prejudiced the plaintiff; it would seem to have rather exalted the measure of duty required of the defendant. The use of the term, however, was unnecessary, and on another trial it can be omitted from the instruction.

Objection is made to the action of the court in giving and refusing other instructions. Consideration of these objections would involve an unnecessary repetition of what has been already said. On another trial, if the evidence be the same, the instructions given can be made to conform to the principles herein announced.

The judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted, to be had not in conflict with the views expressed in this opinion.

Reversed.

TEXAS & P. RY. CO. *v.* TUCK.

(Supreme Court of Texas, Dec. 22, 1909.)

[123 S. W. Rep. 406.]

Master and Servant—Safe Place for Work—Degree of Care.*—The degree of care required of a master in furnishing a safe place for work does not depend on the grade of the employment, but on the character of the place and of the service to be performed.

Master and Servant—Injuries to Servant—Safe Place for Work.—Though rails beside the track were at the proper place for their use, defendant railroad, in permitting grass to grow up around them and conceal them from view, was guilty of negligence, rendering it liable for injuries to a section hand falling over the rails while performing his duty of carrying ties.

Negligence—Evidence—Report of Accident.—In a personal injury action, the exclusion of the report of the accident made by the witness then on the stand was not error; plaintiff's counsel, while having asked the witness if he made a report, not having claimed that the report differed from the evidence given on the stand.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by R. E. Tuck against the Texas & Pacific Railway Company. A judgment for plaintiff was affirmed by the Court of Civil Appeals (116 S. W. 620), and defendant brings error. Affirmed.

W. L. Hall and Head, Dillard, Smith & Head, for plaintiff in error.

J. H. Wood, for defendant in error.

BROWN, J. We copy the following statement of the case and conclusions of fact from the opinion of the Court of Civil Appeals:

"R. E. Tuck, appellee, instituted this suit against the Texas & Pacific Railway Company to recover damages for personal inju-

*For the authorities in this series on the subject of the degree of care required of an employer in furnishing a safe place to work, see second foot-note of *Thomas v. Wisconsin Cent. Ry. Co.* (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609; first head-note of *St. Louis S. W. Ry. Co. v. Lewis* (Ark.), 33 R. R. R. 618, 56 Am. & Eng. R. Cas., N. S., 618.

ries. The negligence alleged against appellant was in its failure to provide appellee a safe place to do his work, in that iron rails were permitted to be on the right of way and railway yards at Pilot Point, and in allowing them to be obscured by Bermuda grass and weeds, and not informing appellee of the same; that

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he did not know of the position of said rails prior to the time of his injury. Appellant answered by a general denial and pleas of assumed risk and contributory negligence on the part of appellee. A trial resulted in a verdict and judgment in favor of appellee for \$1,000. Defendant perfected an appeal.

"Conclusions of fact: Appellee was engaged as a section hand, with Harve Estes as foreman, with headquarters at Tioga, on October 15, 1906, the date that he was hurt. He, with his foreman and the rest of his section gang, went to Pilot Point, a place not on appellee's regular section, for the purpose of assisting R. L. Reynolds, foreman of the Pilot Point section, and his gang, in putting in some switch ties. While engaged with other section men in carrying a switch tie in the Pilot Point yards, appellee and his collaborators struck and stumbled over some railroad rails which were lying obscured by grass and weeds at the point where they were carrying said tie, causing him to fall against said tie, by reason of which he was injured. The time that appellee was injured was the first time he had ever been at said place. Appellee had no knowledge of the position of said rails prior to the time he was injured. He did not assume the risk, and was not guilty of contributory negligence. The appellant was guilty of negligence in placing said rails in its railway yards at Pilot Point, and in permitting them to be obscured by grass and weeds, and not informing appellee of the same. By his injuries appellee sustained damages in the amount of the verdict and judgment."

We will state these facts in addition to those found in the opinion of the Court of Civil Appeals: The main track of the railroad at that place runs north and south. At a point north of the depot building, and on the west side of that track, a track known as the "passing track" leaves the main track and runs south, parallel therewith, connecting with it at a point south of the connection of the house track, which leaves the main track at a point north of the connection with the passing track, and runs on the west of and parallel to the main track to a point north of the depot building for a distance not given. The depot building is located on the east side of this track. At a point north of its connection with the main track, a spur track leaves the house track, running in a southeast direction. The point of junction of the house and spur tracks was the place at which the repair of the switch was being made. A push car was standing on the spur track at about 50 feet from the switch. The ties to be used were near to the east side of the house track, about 30 feet from the spur track. The ties were loaded on the push car, which was then moved to the switch. The section men loaded the ties, by lifting them, one or more men at each end, and carrying them to the push car. Between the place where the ties were located and the push car, Bermuda grass was growing near the spur track, and

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in this grass were iron railroad rails on the ground, concealed from view by the grass. The switch at which the repairs were being made was about 100 yards south from the depot building.

Counsel for plaintiff in error insist that the railroad company did not owe to Tuck—a section hand—the duty to exercise the same degree of care as was due from it to other employees who performed services on the ground. The trial judge gave this charge: "It is the duty of a railway company to exercise ordinary care to furnish its employees a reasonably safe place in which to work in the performance of the duties required of them under their employment, so that their said work may be performed with a reasonable degree of safety to themselves; and if a railway company fails in the exercise of ordinary care in this respect, and an employee suffers an injury directly and proximately caused by such failure, if any, then such railway company is liable in damages to such employee, provided employee is himself free from negligence proximately causing or helping to cause the injury, and provided, further, that at the time of the injury such employee did not know, or in the ordinary discharge of his duties must not necessarily have known, of the danger attending his performing his work over and about said place." The work of the section hands was being performed in the railroad yards at Pilot Point, where trainmen and other employees would be required to perform their several duties, and it is not denied that if Tuck had been a brakemen, performing duties as such, the rule of law expressed in the charge would be correct. The care required does not depend upon the grade of employment, but upon the character of the place and of service to be performed.

It is claimed that the rails were at the proper place for their use. Granting that to be true, it is no answer to the negligence, which consisted in permitting the grass to grow up so as to conceal the rails from the view of persons walking there in discharge of their duty. It constituted a trap for the feet of the ordinarily prudent man. Whatever may be the correct rule as to care due to section hands working on the line of the road away from places of resort by others, we can see no reason for a distinction in this case between Tuck and any other person who might lawfully use that ground. We hold that no error was committed by the court in the charge complained of.

The court did not err in excluding the report of the accident made by the witness then on the stand. The bill of exception shows that plaintiff's counsel asked the witness if he had made a report of the accident; but it does not show that plaintiff's counsel claimed that the report differed from the evidence given on the stand, nor is any other reason given why it should have been admitted.

We find no reversible error, and the judgment is affirmed.

PRATT v. SOUTHERN RY. CO.

(Supreme Court of Alabama, Jan. 20, 1910.)

[51 So. Rep. 604.]

Master and Servant—Contributory Negligence of Servant—Evidence.*—Where plaintiff, a switchman, stood between the rails of a track over which a switch engine approached him at the rate of from two to four miles an hour, and when the engine came within stepping distance undertook to mount the footboard, fell, and was injured, he was guilty of negligence, barring his recovery, although the footboard and the handhold on the engine were defective, and it was his right as switchman to ride on the footboard.

Appeal from Circuit Court, Jefferson County; A. O. Lane, Judge.

Action by R. L. Pratt against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Jere C. King, for appellant.

Weatherly & Stokely, for appellee.

McCLELLAN, J. The court below gave the affirmative charge for the defendant (appellee) evidently upon the theory that the plaintiff was guilty of negligence that contributed proximately to his injury. We concur in the conclusion entertained and applied below. The plaintiff was a switch engine foreman. The engine had been at rest for some time in consequence of a "block" caused by another train. The engine, of the switch engine type, was started in the direction of plaintiff, he standing between the rails of the track over which the engine was approaching him, at the rate of from two to four miles an hour. Though knowing of the approach of the engine, he remained where he was, and when the engine reached a point within stepping distance he undertook to and did place his foot on the footboard, which, there was evidence tending to show, was bent or so out of condition as to render it difficult to stand upon it or hold a footing on it, and reached for the handhold. The evidence was in dispute as to whether there was a handhold or not. The plaintiff testified there was

*For the authorities in this series on the question whether it is contributory negligence for a railroad employee to board a moving train, locomotive or car, see third foot-note of *Vaillancourt v. Grand Trunk Ry. Co.* (Vt.), 33 R. R. R. 353, 56 Am. & Eng. R. Cas., N. S., 353; second foot-note of *Reeves v. North Carolina R. Co.* (N. Car.), 33 R. R. R. 382, 56 Am. & Eng. R. Cas., N. S., 382.

For the authorities in this series on the subject of the combined effect of negligence and contributory negligence, in actions for injuries to employees, see foot-note of *Kentucky, etc., Co. v. Snyder* (Ky.), 17 R. R. R. 520, 40 Am. & Eng. R. Cas., N. S., 520.

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none, and his effort to grab it, and thereby maintain his place on the footboard, failed. He immediately fell in front of the engine and was injured. There is evidence to the effect that servants, such as this plaintiff was, had the right to ride on the footboards on switch engines. However, this testimony had no tendency to show that proper prudence was employed in attempting to board the engine as plaintiff did.

The chief point of contention for appellant seems to be that, since a properly constructed or equipped switch engine should have unbent footboards at the forward and rear ends, and also a handhold or handholds, the proximate cause of this injury should be ascribed to the bent footboard, or to the absence of a proper handhold, or to both, and, in the operation, relegating the negligent act of the plaintiff in attempting, as and when he did, to board the engine to the creating of a condition, merely, upon which the imperfections of the mechanism referred to operated to afford the proximate cause of the injury. The defect or defects complained of existed before plaintiff negligently placed himself in a position wherefrom his injury resulted. It was his negligent act that gave opportunity for injury to flow from the defect or defects. Without his negligent act the imperfections were inactive, harmless to plaintiff. His right to ride on the footboard did not, as stated, comprehend any right to leave the course of at least ordinary prudence to enjoy the right to ride. Viewed with utmost favor to the plaintiff, the defects described in his pleading concurred with his imprudent, negligent act in the great injury that befell him.

The judgment is affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MAYFIELD, JJ., concur.

RUSSELL'S ADM'R v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, Feb. 1, 1910.)

[124 S. W. Rep. 841.]

Master and Servant—Death of Servant—Railroads—Contributory Negligence.*—A railroad rule requiring car repairers to place a blue flag on each end of a cut of cars on which repairs were being made required both inspectors and carpenters working on cars to protect their own safety, so that, where a car carpenter was killed by failure to put out flags, it was not material that the car inspector who was his superior was working with him at the time, and was chargeable with the same negligence.

Evidence—Admissibility—Conclusions.—In an action for the death of a car inspector while aiding in the repair of certain cars, evidence, that it was negligent operation for the trainmen to run the engine into the yards without ringing the bell or giving other adequate warning of the engine's approach, was inadmissible as calling for the opinion of the witness.

Appeal from Circuit Court, Logan County.

"Not to be officially reported."

Action by C. L. Russell's Administrator against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. W. Davis, B. F. Proctor, and Greene, Van Winkle & Schoolfield, for appellant.

Browder & Browder, Benjamin D. Warfield, and Chas. H. Moorman, for appellee.

O'REAR, J. C. L. Russell was a car carpenter in the service of appellee at its yards at Russellville, Ky., and had been so employed for 15 or 16 years, when he lost his life. His duties were to inspect cars in that yard, and more particularly to repair such as the inspection showed needed repairing, when it could be done without sending them to the shops. In addition to Russell there was another, Thornton, who was denominated an inspector. His duty seems to have been to inspect all freight cars in the yard to detect the necessity for repair, and if found defective to tag them accordingly and notify the agent of the fact. He also helped at repairing the cars when it could be done without taking them to the machine shops. Over these two men in authority was the master mechanic, Ryan. The testimony is that in his absence Russell

*For the authorities in this series on the subject of contributory negligence of an employee in violating rules or orders, see first footnote of *Louisville & N. R. Co. v. Fitzgerald* (Ala.), 33 R. R. R. 577, 56 Am. & Eng. R. Cas., N. S., 577.

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acted in his place. On August 14, 1905, Thornton discovered a coal car on the house track in the Russellville yard that was out of repair. He tagged it and reported it. He then sent word to Russell to come up and examine it to see whether it could be there repaired. Russell came. He advised repairing it there. Thereupon Thornton went under the car to do the work. Russell said he would watch out for him. After a few minutes Thornton reported the work done, as well as could be done there, and that he thought it would do until the car got to the shops. Russell was then standing at the end of the car between the rails, and, as he stooped and looked under the car, evidently to confirm Thornton's opinion as to the efficiency of the repair, the cut of cars, of which that one formed a part, was struck and moved forward by an incoming local freight train, Russell was knocked down by the impact, and killed. The cut of cars contained six or eight freight cars. A rule of the railroad company required car inspectors to place a blue flag on each end of a cut of cars on which they were working as notice to trainmen not to touch them while the flags were there. The rule was known to Thornton and Russell. But they did not observe it on this occasion. The train which struck their car was a regular local freight, which came in on or about the time it was due. In coming into the yard it went up to the house track, which was next to the freight station, to place cars and discharge freight. There was evidence that it was moving slowly—not over four miles an hour—yet its bell was not ringing. On the other hand the evidence for the company was that the bell was ringing. This suit by Russell's administrator to recover damages from the railroad company for the destruction of the intestate's power to earn money developed the foregoing facts.

The court instructed the jury that if those in charge of the engine of the local freight train negligently failed to ring its bell so as to give timely warning to laborers in the yards of the movements of the train, and that by reason of such failure Russell lost his life, the law was for the plaintiff. But that if Russell by his own negligence so contributed to his injury, notwithstanding the negligence of those in charge of the engine, that his injury would not have occurred, the law was for the defendant. The verdict was for the defendant railroad company.

Appellant's principal complaint on this appeal is that the court should have instructed also that Thornton was superior in authority to Russell, and that if Thornton negligently ordered Russell to do the work in a place of peril, without having taken the necessary precaution to flag the car, the law was for the plaintiff. The rules of the company which were known to Russell as well as to Thornton, and which were promulgated for the guidance of each, required car inspectors to place blue flags on each end of the car or cut of cars on which they were engaged at work. There was

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not evidence that Thornton ordered Russell to do any work on the car. As a matter of fact he did none. It was Russell's duty to protect himself by keeping in a place of safety, or if he went on or under the car to put out the flags for his protection. Whether Thornton was negligent in not placing the flags is wholly beside the case, as his negligence did not excuse Russell from that duty.

Appellant complains, too, that the circuit court erred in rejecting certain testimony offered on his behalf, to the effect that it was negligent operation for the trainmen to run the engine in the yards without ringing the bell or giving other adequate warning of the engine's approach. But the court did better for appellant than if the testimony had been allowed. For he told the jury that as a matter of law it was actionable negligence to so operate the train. Nor was the opinion of the witnesses competent evidence. Whether the operation of the train was prudent or negligent was, either a matter of law, or it was one of law and fact to be determined upon the whole case—not by the opinions of witnesses. We perceive no error in the record.

Judgment affirmed.

LINDSAY *v.* PENNSYLVANIA R. Co. *et al.*

(Court of Errors and Appeals of New Jersey, Feb. 28, 1910.)

[75 Atl. Rep. 912.]

Railroads—Crossing Accidents—Duty to Look.*—The plaintiff's intestate, in attempting to cross a railway at a street crossing, was killed while on the first of four lines of tracks. When on the sidewalk about 15 feet from the crossing he stopped, and looked in the direction from which trains using the first line of tracks usually came, and then proceeded to walk across without making any further observation, although he could have done so effectively at least four feet before going on the track. When near the second rail of the first line of tracks he turned to look towards a coming train, but was instantly struck by it. If he had looked before going on the track, he would have seen the train and avoided the accident. Held, that he was bound to look from a point where it would be effective, just before going upon the track, and that his neglect to do so contributed to the accident.

*See last foot-note of *Wilkinson v. Oregon Short Line R. Co.* (Utah), 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; see third head-note of *Barthelmas v. Lake Shore, etc., Ry. Co.* (Pa.), 34 R. R. R. 378, 57 Am. & Eng. R. Cas., N. S., 378; second foot-note of *Blodgett v. Central Vermont Ry. Co.* (Vt.), 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511; foot-note of *Bistider v. Lehigh Valley R. Co.* (Pa.), 33 R. R. R. 492, 56 Am. & Eng. R. Cas., N. S., 492.

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Railroads—Duty of Person Crossing Tracks—Failure to Give Statutory Warning or Lower Gates.†—The negligent conduct of the railroad company in not giving the statutory warning, or in not lowering gates at a crossing, does not absolve a person from the exercise of that due care and caution which is required from one going into a place of danger.

The Chancellor, and Garrison, Swayze, Bogert, Vroom, and Congdon, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Carrie D. Lindsay, administratrix of David B. Dunham, against the Pennsylvania Railroad Company and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

R. L. Lawrence, for plaintiff in error.

Alan H. Strong, for defendants in error.

BERGEN, J. Plaintiff's intestate was killed while attempting to cross the railway tracks of the Pennsylvania Railroad Company at Milton avenue in the city of Rahway, and this suit was brought against that company, and the engineer driving the engine which struck and killed the deceased, to recover damages therefor. At the close of the plaintiff's case a nonsuit was ordered, and judgment for defendants entered, which this writ seeks to review.

The defendant company's line of railway at the place of the accident consisted of four tracks crossing Milton avenue at an angle of 58 degrees, and on the day of the accident deceased, walking along the north side of the avenue, approached the crossing from the west, on which side of these tracks the company had a waiting room, and a platform which extended to the north side of Milton avenue. In coming from the west there is a short distance within which the waiting room building intercepts the view to the north, but at least four feet before reaching the first rail an unobstructed view can be had along the track to the north for

†For the authorities in this series on the subject of the combined effect of contributory negligence on the part of the highway traveler and failure to give the statutory warnings of the train's approach, see last foot-note of *Cottle v. New York, etc., R. Co. (Conn.)*, 34 R. R. R. 283, 57 Am. & Eng. R. Cas., N. S., 283; third head-note of *Conway v. Louisville & N. R. Co. (Ky.)*, 34 R. R. R. 313, 57 Am. & Eng. R. Cas., N. S., 313.

For the authorities in this series on the question whether a highway traveler has the right to rely upon the fact that the railroad crossing gates are open, see first foot-note of *Slaterry v. New York, etc., R. Co. (Mass.)*, 34 R. R. R. 795, 57 Am. & Eng. R. Cas., N. S., 795; third foot-note of *Evansville & T. H. R. Co. v. Berndt (Ind.)*, 34 R. R. R. 535, 57 Am. & Eng. R. Cas., N. S., 535; second head-note of *Lundergan v. New York, etc., R. R. (Mass.)*, 34 R. R. R. 344, 57 Am. & Eng. R. Cas., N. S., 344.

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a considerable distance. The two westerly tracks running nearest the platform are used, ordinarily, by trains coming from the north, and deceased was killed between the rails of the most westerly track, while nearest the east rail. Deceased was very familiar with this crossing, having passed over it three or four times daily for many years when going between his home and his place of business, and, it is to be presumed, knew that the track he first went upon was used by trains coming from the north. The statutory signals were not given, nor were the gates at the crossing lowered, although put there by the company to prevent persons from crossing in front of approaching trains. A baggage truck with baggage on it was standing on the platform towards the southerly or Milton avenue end, and a number of passengers were standing on different parts of the platform, but this did not intercept the view of the deceased along the tracks to the north, before going upon them, nor prevent an effective observation in that direction while he was in a safe position.

Five persons were called who saw the accident and describe the conduct of the deceased. Ferdinand Graves, a hack driver, testifies that he was in his hack along the westerly side of the platform, and about 15 feet north of Milton avenue; that deceased stopped some 10 or 15 feet before reaching the point where his view to the north would be obstructed by the passenger room, and looked towards the direction from which a train from New York would approach; that deceased then started to walk towards the track, and when he passed behind the station, and beyond witness' view, witness, who expected to be engaged to drive deceased, left his carriage, walked across the platform to see whether deceased would come towards him along the platform or cross the track, and saw him stepping on the track to cross over; that witness heard the sound of a whistle, and as he stepped back saw the train strike the deceased. There is nothing in this testimony to show that the deceased made, or attempted to make, any observation after he had come from behind the station and reached a point where his observation would be effective. William E. Freeman saw the deceased in the middle of the tracks, just as he was struck. He was facing straight across the tracks, and witness did not see him turn to look at the train at any time. This testimony is of very little importance, because the witness did not see deceased until he was partly over the track, at about the moment he was killed, and throws no light upon the question whether any observation was made, or care exercised, by deceased before he ventured into a dangerous place. Two other witnesses, Michael Gettings and Isaac B. Crew, were in a wagon on Milton avenue, approaching the crossing from the other side of the track, and were facing deceased. Gettings said that he saw deceased just as he was starting to cross, and that he was walking along, looking straight ahead. Crew testifies that he saw deceased approach

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the crossing and step on the track; that while crossing he looked one way, and just as he was going to look the other way, he was struck, but this was after he had gone into the place of danger, from which he could not escape in time to avoid injury. It was his duty to look before he went on the track, and not wait until observation could be of no possible use, for he did not attempt to look, according to this witness, until the train was upon him. *Gehring v. Atlantic City R. R. Co.*, 75 N. J. Law, 490, 68 Atl. 61, 14 L. R. A. (N. S.) 312. The remaining witness, Edward G. Abbott, did not see the deceased until just at the time he was struck; the attention of the witness being called to the place where deceased was, by the sound of the whistle, as he was struck.

As the uncontradicted testimony shows that the deceased, by the exercise of ordinary prudence and reasonable observation at a time when it would have been effective, could have seen the train before he went upon the track, and there being no proof that he exercised ordinary care and prudence, or made any attempt to ascertain whether it was safe to go upon the track when he did, it seems to be a plain case of contributory negligence, the result, perhaps, of the constant use of this crossing by deceased, and a familiarity with the situation, which lulled his appreciation of the danger and made him careless about exercising the prudence required in such a case. It also appeared that the deceased was deaf, or as the witness said "hard of hearing," and that "it grew on him from middle life." This loss, or partial loss, of one of his senses increased his obligation to be cautious, and "reasonable prudence would dictate delay until such observation, as is requisite, has been made." *Newark Passenger Railway Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; *Central R. R. Co. v. Smalley*, 61 N. J. Law, 277, 39 Atl. 695. That the failure to give a warning or to lower crossing gates does not absolve one attempting to cross a railway track from the exercise of care and prudence is too well settled in this state to require the citation of authorities.

The nonsuit was properly ordered, and the judgment under review is affirmed.

The CHANCELLOR, and GARRISON, SWAYZE, BOGERT, VROOM, and CONGDON, JJ., dissent.

WEATHERLY *v.* NASHVILLE, C. & ST. L. RY.

(Supreme Court of Alabama, Dec. 21, 1909. Rehearing Denied Feb. 26, 1910.)

[51 So. Rep. 959.]

Death—Actions—Contributory Negligence of Deceased as Defense.

—Under Code 1907, § 2486, authorizing a personal representative to maintain an action for damages for negligence causing intestate's death, if intestate could have maintained an action therefor if death had not resulted, contributory negligence by intestate which would have barred an action by him had death not resulted will bar an action for his death by his personal representative.

Death—Actions—Presumptions.—The fact that decedent cannot testify as to how the injury happened cannot be considered to raise a presumption in favor of or against his personal representative in an action by him for intestate's death by wrongful act.

Railroads—Accidents at Crossings—Negligence—Rate of Speed.*

The running of a train 30 miles an hour over a street crossing at a traveled street, and in excess of the speed limit fixed by ordinance, is ordinary negligence.

Negligence—Proximate Cause.†—Defendant's negligence must have proximately contributed to the injury, in that it would not have happened except for such negligence, in order to be actionable.

*For the authorities in this series on the question whether any rate of speed of a railroad train in a city or other municipality may constitute negligence where it is not limited by statute or ordinance, see foot-note of *Freedman v. New York, etc., R. Co.* (Conn.), 34 R. R. R. 121, 57 Am. & Eng. R. Cas., N. S., 121, where all those preceding it are collected.

For the authorities in this series on the question whether the running of a train or street car in violation of a speed ordinance is negligence, see last foot-note of *Dyson v. Southern Ry. Co.* (S. Car.), 33 R. R. R. 486, 56 Am. & Eng. R. Cas., N. S., 486; third head-note of *Norfolk, etc., Co. v. Forrest's Adm'x* (Va.), 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472; second foot-note of *Cleveland, etc., Ry. Co. v. Powers* (Ind.), 33 R. R. R. 563, 56 Am. & Eng. R. Cas., N. S., 563; first foot-note of *Henry v. Cleveland, etc., Ry. Co.* (Ill.), 32 R. R. R. 48, 55 Am. & Eng. R. Cas., N. S., 48; third head-note of *Kern v. Des Moines City Ry. Co.* (Iowa), 32 R. R. R. 29, 55 Am. & Eng. R. Cas., N. S., 29.

†See third foot-note of *Yeates v. Illinois Cent. R. Co.* (Ill.), 34 R. R. R. 65, 57 Am. & Eng. R. Cas., N. S., 65; foot-note of *Chittick v. Philadelphia R. T. Co.* (Pa.), 34 R. R. R. 278, 57 Am. & Eng. R. Cas., N. S., 278; last foot-note of *Conway v. Louisville & N. R. Co.* (Ky.), 34 R. R. R. 313, 57 Am. & Eng. R. Cas., N. S., 313.

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Railroads—Trespassers—Duty of Railroad.†—Except at public crossings, and in a few other places, a railroad company's right of way is its exclusive property, and it only owes to those trespassing thereon the duty not to wantonly or willfully injure them.

Railroads—Accidents at Crossings—Duties at Crossing.§—While the rights of a railroad company and of the public to use a street are mutual, the former has the right of way at crossings by reason of the nature of the road, but must use reasonable care to avoid injury in view of all the circumstances, and each may rely upon the exercise of due care by the other to avoid injury only to a limited and reasonable extent.

Railroads—Accidents at Crossings—Contributory Negligence—Duty to Stop, Look, and Listen.||—Pedestrians at a public street crossing should inform themselves of the proximity of trains, and stop, look and listen therefor before attempting to cross, in the absence of facts excusing them of such duties.

Railroads—Accidents at Crossings—Duties at Crossing—Effect of Statutes.¶—The imposition by statute or ordinance of certain duties upon railroad companies at public crossings does not exempt them from all other duties which are reasonably necessary to avoid injury at the crossings.

Railroads—Accidents at Crossings—Negligence—Violation of Statutes.*—The violation of a railroad company of duties imposed upon it by statute or ordinance as to running over public crossings constitutes at least simple negligence.

†See last foot-note of *Martin v. Union Springs & N. Ry. Co. (Ala.)*, 34 R. R. R. 785, 57 Am. & Eng. R. Cas., N. S., 785; first head-note of *Chesapeake & O. Ry. Co. v. Hawkins (C. C. A.)*, 34 R. R. R. 757, 57 Am. & Eng. R. Cas., N. S., 757.

§See second foot-note of *Wilkinson v. Oregon S. L. R. Co. (Utah)*, 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; first foot-note of *Baldie v. Tacoma Ry. & Co. (Wash.)*, 34 R. R. R. 350, 57 Am. & Eng. R. Cas., N. S., 350; foot-note of *Atchison, etc., Ry. Co. v. Schriver (Kan.)*, 33 R. R. R. 267, 56 Am. & Eng. R. Cas., N. S., 267; last foot-note of *Miller's Adm'r v. Illinois Cent. R. Co. (Ky.)*, 34 R. R. R. 396, 57 Am. & Eng. R. Cas., N. S., 396; last foot-note of *Norfolk, etc., Co. v. Forrest's Adm'r (Va.)*, 33 R. R. R. 472, 56 Am. & Eng. R. Cas., N. S., 472.

||See first foot-note of *Garrison v. St. Louis, etc., Ry. Co. (Ark.)*, 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543; third foot-note of *Wilkinson v. Oregon S. L. R. Co. (Utah)*, 34 R. R. R. 360, 57 Am. & Eng. R. Cas., N. S., 360; second foot-note of *Cottle v. New York, etc., R. Co. (Conn.)*, 34 R. R. R. 282, 57 Am. & Eng. R. Cas., N. S., 282; first foot-note of *Blodgett v. Central Vt. Ry. Co. (Vt.)*, 33 R. R. R. 511, 56 Am. & Eng. R. Cas., N. S., 511.

¶For the authorities in this series on the question whether statutory requirements are the sole measure of a railroad company's duties in regard to crossing signals, see foot-note of *Chesapeake & O. Ry. Co. v. Dandridge (C. C. A.)*, 33 R. R. R. 489, 56 Am. & Eng. R. Cas., N. S., 489; last foot-note of *Russell v. Oregon R. & Nav. Co. (Ore.)*, 33 R. R. R. 497, 56 Am. & Eng. R. Cas., N. S., 497.

See () on preceding page.

Weatherly v. Nashville, etc., Ry

Railroads—Accidents at Crossings—Negligence—Liability.—Code 1907, § 5476, making a railroad company liable for all injury to persons or property caused by failure to comply with statutory duties as to crossings and placing the burden upon them to show performance of such duties, does not make them liable for injuries at crossings irrespective of negligence which contributed to the accident.

Railroads—Accidents at Crossings—Negligence—Res Ipsa Loquitur.**—The mere injury of a person or property at a public crossing by a railroad company does not of itself make the company liable therefor; the doctrine of *res ipsa loquitur* not applying.

Railroads—Accidents at Crossings—Negligence—Violation of Statutory Duties—Wanton Negligence.—While as a rule failure to comply with the duties imposed upon a railroad company at a public crossing by statute or ordinance constitutes only simple negligence, failure to comply with such duties may be so gross, reckless, and wanton as to amount to wanton negligence.

Railroads—Accidents at Crossings—Negligence—Wanton Negligence.††—A railroad company would be liable for injuries at the crossing, though the injured party was also negligent, and its employees were not negligent after seeing his danger, if the train was run at a high rate of speed, without signals, over an unguarded public crossing in a populous city district, or at a place where the public usually crossed the track in large numbers, which the train employees knew; their conduct amounting to reckless indifference.

Railroads—Accidents at Crossings—Actions—Wanton Negligence—Question for Jury.—Intestate was killed by being struck by a passenger train at a public street crossing at about 8 o'clock p. m. The railroad track curved from the signal post about a quarter of a mile from the crossing to a point from 150 to 300 feet therefrom, but was straight from there to the crossing. The train was running from 25 to 30 miles an hour with headlights burning, and the whistle was blown at the signal post, but it was not shown with certainty whether bell or whistle signals were given, or brakes applied, or the speed slackened, between the signal post and within 20 or 30 feet of the crossing, but at that point the steam was shut off, brakes applied, and the danger signals given, though the train was not stopped until after passing the place of injury several hundred feet. Intestate was seen standing by the side of the track just as the danger signals were

**For the authorities in this series on the question whether a presumption of negligence on the part of those in charge of the train or car arises from the fact that a person is injured at a railroad crossing, see third foot-note of *Garrison v. St. Louis, etc., Ry. Co. (Ark.)*, 34 R. R. R. 543, 57 Am. & Eng. R. Cas., N. S., 543; foot-note of *St. Louis, etc., Ry. Co. v. Evans (Ark.)*, 23 R. R. R. 314, 46 Am. & Eng. R. Cas., N. S., 314.

††See foot-note of *Southern Ry. Co. v. Yancy (Ala.)*, 13 R. R. R. 466, 36 Am. & Eng. R. Cas., N. S., 466; second foot-note of *Birmingham, etc., Co. v. Jones (Ala.)*, 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568.

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given. There was a building on either side of the track at the crossing, and at the time of the accident there was much travel over it. The street had long been much used by the public, and the engineer in charge had been on that particular run for some time. Held, that the question of whether defendant was guilty of wanton negligence in running over intestate was for the jury.

Railroads—Accidents at Crossings—Actions—Proximate Cause—Question for Jury.—Whether defendant's wanton negligence in running its engine at a crossing proximately caused intestate's death was for the jury.

Railroads—Accidents at Crossings—Actions—Evidence—Admissibility.—In an action for intestate's death by being struck by defendant's engine at a public street crossing, plaintiff could show the extent and frequently of travel at the crossing at the time of the injury.

Witnesses—Examination—Leading Questions.—Leading questions were properly excluded.

Railroads—Accidents at Crossings—Actions—Evidence—Admissibility.—In an action for intestate's death by being struck by defendant's train at a street crossing, evidence as to whether one standing where intestate was when injured could distinguish defendant's tracks from those of another company running parallel thereto, or whether the lights seemed to make one track look like the other, was not admissible, where it was not shown that intestate was so deceived.

Dowdell, C. J., and Simpson, J., dissenting.

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by G. W. Weatherly, administrator, against the Nashville, Chattanooga & St. Louis Railway. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Culli & Martin and *Howard & Hunt*, for appellant.

Goodhue & Blackwood, for appellee.

MAYFIELD, J. Appellant sued to recover damages for the wrongful death of his intestate. The action is under our familiar homicide statute. The complaint contained six counts. Count 1 relied on simple negligence. The other counts declared on wanton negligence and willful injury. The wrongful act complained of in each count is that defendant ran one of its trains or engines against plaintiff's intestate, thereby killing him. The avenue is a public street crossing in the city of Gadsden. The time was 8 o'clock at night, on May 27, 1907. The train alleged to have killed the intestate was a regular daily passenger train, coming into Gadsden at this hour. Each count alleges that intestate was crossing or attempting to cross the defendant's railroad track at a public street crossing in the city of Gadsden at the time of the injury. The defendant pleaded the general issue and contributory negligence to the first count, and the general issue as to the other

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counts. After the plaintiff had introduced all his evidence, the defendant declined to introduce any evidence, and moved the court to exclude that of the plaintiff's, and requested the general affirmative charge in its favor. The court granted the motion, and gave the charge requested, which, of course, resulted in a verdict for defendant, from which plaintiff appeals, here assigning various errors, chief among which are the exclusion of his evidence, and the giving of the charge for defendant. The complaint was unquestionably proven, except as to the allegations of negligence or willful acts of defendant which caused the injury.

Therefore the important, if not the sole, question for review is: Did the evidence show, or tend to show, that the intestate's death was proximately caused by any wanton negligence or willful act alleged, or was it the result of, or proximately caused by, any act of simple negligence alleged, to which injury or death intestate's own negligence did not proximately contribute, or was intestate's death, as shown by the evidence, a mere accident, for which no one is civilly liable? The plaintiff cannot, and should not, recover in this action unless the intestate could have recovered for the injury, under the same state of facts, if death had not resulted; that is, if he was guilty of such contributory negligence as would have barred his own action for the injury had death not resulted, then that same negligence will bar plaintiff's action when death resulted. Code, § 2486 (27). The fact that intestate cannot tell his story as to how the injury happened cannot be considered to raise a presumption in plaintiff's favor, or against the defendant. The case must be tried as if intestate were present and declined to testify, except that no presumption must be indulged against plaintiff for such failure to testify.

As to the first count, the evidence we think clearly shows simple negligence in running the train 30 miles per hour and in excess of the speed fixed by the municipal ordinance of the city of Gadsden. It was also open to the jury to infer from the evidence that there was a failure on the part of the railroad company to comply with section 5473 (3440) of the Code.

The next inquiry is: Was or could it be inferred by the jury that this negligence proximately contributed to or caused the death, or was the death the result of, or proximately caused by, intestate's own negligence, did plaintiff's own evidence affirmatively show this, or was it a mere accident for which no one is responsible, or was the jury authorized to infer wanton negligence or willful injury from this evidence, so as to avoid the contributory negligence of plaintiff's intestate, if found to exist? The mere concurrence of negligence on the part of a defendant, with injury to the plaintiff, does not always make a cause of action for the injury. The negligence of the defendant must proximately contribute to the injury; that is, but for the negligence, the injury would not have happened. The same is true as to the

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plaintiff's negligence. The mere fact that a plaintiff was guilty of negligence when he was injured by defendant's negligence does not defeat his action for the injury. To do this his negligence must have proximately contributed to his own injury. There is, however, a class of cases in which a plaintiff will be entitled to recover for an injury suffered when he was guilty of negligence, and when, but for his negligence, the injury would not have happened. This class of cases is where the negligence of the plaintiff precedes that of the defendant; that is, where the defendant was guilty of negligence which directly caused or proximately contributed to the injury after the plaintiff's negligence, and the defendant, by the exercise of reasonable care after knowledge of the plaintiff's negligence, could have avoided the injury. This class is denominated "subsequent negligence" and "last clear chance" cases. This same doctrine or rule also applies to defeat plaintiff's right of recovery, when he has the last chance to avoid the injury and negligently fails so to do, or is thereafter guilty of the last act of negligence which proximately contributes to his injury, which, but for his negligence, would not have resulted. This doctrine or rule had its origin in England, being first announced in the case of *Davis v. Mann*, 10 Mus. 7 & Wer. 546, in which the owner of a donkey turned it out upon the streets with its feet fettered and clogged, and a traveler on the highway negligently drove a wagon against it, and killed it.

The doctrine has since spread to the United States, and has been announced, clarified, and amplified by most all courts of the Union, state and federal. It is only necessary to state the rule or doctrine as it has been announced in this state and applied to injuries caused at railroad crossings. Some of the cases in this state seem to deny the plaintiff's right to recover for personal injuries inflicted by a railroad at a public crossing where plaintiff himself was guilty of contributory negligence, unless the defendant was guilty of wanton negligence or willful injury; but a close examination of such cases will show that in each the negligence of the plaintiff was concurrent and continuing to the very time of the injury, and was therefore the efficient and direct cause of the injury, without which, it being so continuing and concurring, the injury would not have happened. In these cases the negligence of the plaintiff was clearly the "causa causans." *Fraze's Case*, 81 Ala. 185, 1 South. 85, 60 Am. Rep. 145. In *Tanner's Case*, 60 Ala. 621, the rule is applied, and held to be, that the plaintiff's negligence was no defense, if the defendant could thereafter, by the exercise of reasonable care, have avoided injuring him. In *Cook's Case*, 67 Ala. 539, it is said that, where an injury is perpetrated by a defendant either wantonly, recklessly, or intentionally, the defense of plaintiff's contributory negligence is thereby overcome and vitiated; but such conduct on the part of

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the defendant, says the court, is not necessary in order to establish his liability, though the negligence on the part of plaintiff may have co-operated to produce the damage—affirming and following Tanner's Case, and Gothard's Case, 67 Ala. 114, and qualifying Hanlon's Case, 53 Ala. 70.

If a person voluntarily places himself in an obviously dangerous position on a railroad track, or so near thereto as to be struck by passing trains, thereby assuming the risk, and while there continues to use no proper means of discovering the danger, or, on discovering it, continues in the dangerous position without attempting to avoid it, and, in consequence thereof, is struck by a passing train, he cannot recover, in the absence of wanton negligence or willful injury on the part of the railroad company; but if, after discovering his peril, the result of his contributory negligence, he attempts to avoid the injury, and the railroad company is thereafter guilty of any negligence, simple or wanton, which proximately contributes to his injury, the railroad company is liable. Authorities, *supra*; Richard's Case, 100 Ala. 365, 13 South. 944; Lee's Case, 92 Ala. 262, 9 South. 230.

Except at public crossings and a few other places, the track and right of way of a railroad are its exclusive property, upon which a stranger has no right to be, and to those who trespass thereupon it owes no duty as a rule, except not to wantonly or willfully injure them. But at public crossings a different rule prevails. There the public have a right to use the public street, road, or highway, to travel along it, on foot or in vehicles, and to cross the railroad track, if necessary to use the highway. The rights of the public and of the railroad to use the streets or highways where they are crossed or occupied by a railroad track are mutual and reciprocal. But, owing to the great weight, momentum, and speed of commercial trains, they have the right of way at public crossings. They are confined to a fixed track upon the rails, and cannot turn to right or left to avoid collisions, as can other travelers upon the highway. Yet this right of precedence as to crossings does not exempt the railroad from the duty to try to avoid collisions thereat. The public and the railroad must resort to reasonable and proper efforts, considering all the attendant circumstances in each particular case to avoid the injury. Each may to a limited and reasonable extent rely upon the other to exercise reasonable and ordinary care to avoid injury by collisions. The track itself is a warning to the public of dangers, and travelers should inform themselves as to the proximity of trains before attempting to cross. They must stop, look, and listen for trains before attempting to cross the railroad track, unless there be some fact to excuse them of this duty. Certain duties of railroads as to public crossings are often prescribed by statute and by municipal ordinance, and some of such duties are so provided in this state. Code, §§ 5473-5476. But providing these duties

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by statutes and by ordinance does not exempt the railroad from all other duties which are reasonable to avoid injury or collision at crossings.

A railroad which violates any of these duties imposed by statute or ordinance as to public crossings is at least guilty of simple negligence per se, and, if the omission is established, such negligence arises as matter of law. The statute (section 5476) makes the railroad liable for all injury to persons or property from a failure to comply with the statutory duties as to crossings, and also places the burden upon the railroad to show compliance with its statutory duties. But this negligence, no more than other, does not necessarily make the railroad company liable for all injuries at crossings the result of collisions with its trains. This negligence of failure to comply with the statutory requirements, like all other negligence, in order to render the railroad company liable, must be actionable, and must proximately contribute to the injury complained of. If the injury complained of is the result of plaintiff's negligence, or if his negligence concurred with the simple negligence of defendant's—of failing to comply with the statute or ordinance—in producing the injury complained of, the plaintiff cannot recover. These duties required of railroads at crossings, by statute or ordinance, are no more sacred or binding than are other duties imposed by the common law, which have been announced by the courts and text-writers on the subject, no more sacred or binding on the railroad than are the duties which the common law of this country has enjoined upon the public in crossing railroad tracks, often declared by the courts, among which is the duty to stop, look, and listen before crossing the track.

The mere fact that a person or property is injured by a railroad at a public crossing does not, without more, conclusively make the railroad liable therefor. Nor does the doctrine of "*res ipsa loquitur*" apply. If it did, it would speak the negligence of the plaintiff as much as that of the railroad. It is true that the statute renders the railroad liable for the injury if it results from a failure to comply with the statutory regulations, and places the burden of proof upon the railroad to show a compliance with the statutory duties imposed in such cases. But the effect of the statute is to impose certain duties upon the railroad company which might not otherwise exist, and to place the burden of proof upon the railroad to show that it discharged these duties thus imposed by the statute. The statute does not have the effect to render the railroad absolutely liable for injuries occurring at crossings, irrespective of negligence on its part which caused or contributed to the injury. If it did, it would clearly be unconstitutional. Zeigler's Case, 58 Ala. 594; Parson's Case, 100 Ala. 662, 13 South. 602, 27 L. R. A. 263, 46 Am. St. Rep. 92; Hembree's Case, 85 Ala. 481, 5 South. 173; Green's Case, 73

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Ala. 26; Davis v. State, 68 Ala. 58, 44 Am. Rep. 128; Larkin's Case, 66 Ala. 87; Wilburn's Case, 63 Ala. 436.

As a rule, the mere failure to comply with the duties imposed by statutes and ordinances upon railroads at public crossings constitutes only simple negligence. This has often been declared by this court. Lee's Case, 92 Ala. 262, 9 South. 230; Sampson's Case, 91 Ala. 560, 8 South. 778; Martin's Case, 117 Ala. 382, 23 South. 231; Orr's Case, 121 Ala. 489, 26 South. 35; Mitchell's Case, 134 Ala. 266, 32 South. 735. Yet we do not think that it is impossible for the failure to comply with these duties to be so gross, reckless, and wanton as to amount to wanton misconduct. The failure to comply with these duties, just like the failure to comply with other duties, however imposed, may be so gross, reckless, and wanton as to evince an absolute disregard of the rights of others, and an absolute indifference to the injury of persons and property; and in such cases may render the act which violates the duty wanton negligence, thus making the wanton act as culpable as if the injury had been willfully inflicted, though there be no specific intent to inflict the injury, or specific knowledge or consciousness that the particular injury would result from the wrongful act; that is, negligence may be so gross and reckless as to be wantonness, which may render the party as guilty as if the injury were willfully inflicted. To illustrate, suppose a railroad should pass through a populous city, and along one of its public streets usually crowded and thronged with travelers, and other streets of like kind crossed the street in which was laid the railroad track, all of which was known to the agents in charge of the trains, and that the railroad company should run its heavy passenger and freight trains through such city on such street at the rate of 50, 60, or 70 miles per hour, and with no more precaution than it employs in running these trains through the country on its own exclusive roadbed; it would therefore be impossible to prevent accidents and injuries at these crossings, no matter how careful the public might be. This we think might well be held to be such an act as to constitute wantonness, though there be no specific intent to injure any particular person or property. It might be said to be universal malice. Our court has frequently so decided as to injury both to persons and property by railroads.

The following has often been announced to be the law in this state as to this proposition: "To run a train at a high rate of speed and without signals of approach at a point where the trainmen have reason to believe there are persons in exposed positions on the track, as over an unguarded crossing in a populous district of a city, or where the public are wont to pass on the track with such frequency and in such numbers, facts known to those in charge of the train, as that they will be held to a knowledge of the probable consequence of maintaining great

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speed without warnings, so as to impute to them reckless indifference in respect thereto, would render their employer liable for injuries resulting therefrom notwithstanding there was negligence on the part of those injured, and no fault on the part of the servants after seeing the danger." Lee's Case, 92 Ala. 271, 9 South. 230; Meadors' Case, 95 Ala. 173, 10 South. 141; O'Shields' Case, 90 Ala. 29, 8 South. 248; Webb's Case, 97 Ala. 312, 12 South. 374; Martin's Case, 117 Ala. 383, 23 South. 231; Id., 131 Ala. 279, 30 South. 827; Rice's Case, 142 Ala. 677, 38 South. 857; Id., 144 Ala. 613, 38 South. 857; Foshee's Case, 125 Ala. 199, 27 South. 1006. Railroad companies that knowingly run their trains under conditions rendering it impracticable for those in charge to prevent injury to stock straying upon their tracks are accountable for the injury, except in those cases in which the injury cannot be ascribed to the company's negligence. Hewitt's Case, 139 Ala. 443, 36 South. 39, 101 Am. St. Rep. 42; Harris's Case, 98 Ala. 326, 13 South. 377; Davis's Case, 103 Ala. 661, 16 South. 10; Cochran's Case, 105 Ala. 354, 16 South. 797; Kelton's Case, 112 Ala. 533, 21 South. 819; Stark's Case, 126 Ala. 367, 28 South. 411; Anchors' Case, 114 Ala. 493, 22 South. 279, 62 Am. St. Rep. 116; Brinkerhoff's Case, 119 Ala. 606, 24 South. 892.

If this is true as to live stock, ought it not to be, and is it not, true as to injuries to persons at public crossings? As is said by Coleman, J., in Martin's Case, 117 Ala. 385, 23 South. 231: "It is earnestly contended by appellant that such a rule will greatly impede commercial transactions, and directly impair the efficiency of transportation by railroads. The public and railroads have their respective rights, and are under mutual obligations at public crossings and in the use of them. The doctrine of the *sic utere tuo ut alienum non laedas* applies alike to persons and corporations. The value of human life cannot be overbalanced by any pecuniary or public interest. Our duty is simply to declare the law." The evidence showed that intestate was killed by a regular passenger train of defendant's at a public street crossing in the city of Gadsden; that the train was coming into Gadsden from the North at schedule time, which was about 8 o'clock in the evening. The whistle was blown at the signal post, about a quarter of a mile from the place of the accident. The railroad track, as it approached the crossing, curved from the signal post until it reached a point about 150 or 300 feet from the crossing, and from that distance the track was straight to the crossing. The headlight was burning, and the train was running 25 to 30 miles per hour. It was not made certain whether any bell was rung or whistle sounded or brake applied, or that the speed was checked from the signal post until the train was within 20 or 30 feet of the place where intestate was struck. The evidence showed that at this point the steam was

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shut off, brake applied, alarm sounded, and bell rung; but the train was not stopped until it had passed the place of the injury several hundred feet. The only evidence as to the position of the deceased was that he was seen standing by the side of the track just as the danger signal was given, and when the train was within 20 or 30 feet of him. There was a boarding house on one side of the track at this crossing and a storehouse on the other. At the hour and place of the accident travel along and over the street crossing was much and frequent. The street had been used as a public street of the city for a long time, and was much traveled by the public. The engineer in charge of the locomotive which caused the accident had been running on the defendant's road and this particular run for some time prior to the accident.

Under the evidence shown by the record in this case, we think the question of the degree of the defendant's negligence, of its result, and of the plaintiff's negligence should have been submitted to the jury under proper instructions as to the law applicable to the case, as in this opinion we have endeavored to expound it. We do not think the court can as matter of law say that intestate's negligence proximately contributed to his injury, or that it succeeded or concurred with that of the defendant to produce the injury; or that the evidence did not tend to show, or to authorize the jury to infer, that the defendant was not guilty of wantonness which contributed to, or resulted in plaintiff's intestate's death. It was competent for plaintiff to prove the extent and frequency of travel along the street which intestate was traveling at the time of the injury. The questions propounded to show this were probably leading, and for that reason objections thereto were properly sustained; but, as to some of them, we doubt if this ground was good, though it is not necessary for us to decide the point, as the case must be reversed. However, questions can and should be so framed as not to violate the rules of evidence.

We do not think that it was proper or competent for plaintiff to have the opinions of witnesses as to whether or not a person standing where the deceased was standing at the time of the injury could distinguish the tracks of the defendant company from those of the Louisville & Nashville Railroad Company; or as to whether, on account of the relative positions of the two tracks and the lights, there was superinduced something like an optical illusion which made one track look like the other. If it be conceded that this was true, which was the actual fact in this case, there is not evidence that plaintiff was so deceived, or any facts which would justify the inference that he was so deceived.

The judgment of the trial court is reversed, and the cause is remanded.

Reversed and remanded.

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A majority of the court, composed of ANDERSON, McCLELLAN, SAYRE, and EVANS, JJ., concur in the conclusion that the trial court improperly excluded the plaintiff's evidence, and that it was error to give the general affirmative charges requested by the defendant, and to the effect that there was evidence from which the jury might find that the defendant was guilty of wanton misconduct which proximately contributed to the injury; but do not concur in the conclusions of the writer on the question of contributory or subsequent negligence, and do not desire to commit themselves to what is said in the opinion of the writer on this question. DOWDELL, C. J., and SIMPSON, J., dissent, and are of the opinion that the cause should be affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* WILLIAMS *et al.*

(Supreme Court of Texas, March 9, 1910.)

[125 S. W. Rep. 881.]

Master and Servant—Death of Engineer—Questions for Jury—Negligence and Proximate Cause.—In an action for the death of an engineer killed by striking his head against a mail crane near the track, evidence held to present questions for the jury as to negligence in its location, and whether the condition of the track was the proximate cause of his death.

Master and Servant—Death of Engineer—Res Ipsa Loquitur.*—An inference of negligence arises from the death of an engineer, killed while in the proper performance of his duty by striking his head against a mail crane near the track, and it is for the railroad company in an action for his death to explain and excuse the occurrence.

Master and Servant—Death of Engineer—Evidence as to Negligence—Similar Conditions.†—In an action for death of an engineer, killed by striking his head against a mail crane near the track, evidence as to track condition in December, causing an unusual swaying of the engine which might explain the occurrence, was admissible as to its condition the previous May, at the time of the accident, where there was other evidence showing that its condition was the same at both dates.

*For the authorities in this series on the question whether a presumption of negligence on the part of the employer arises from the fact that an employee is injured, and on the subject of plaintiff's burden of proof in action against master for the death of or injury to his servant, see foot-note of Louisville & N. R. Co. *v.* Caldwell (Fla.), 33 R. R. R. 560, 56 Am. & Eng. R. Cas., N. S., 560.

†See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

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Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Ellen Williams and others against the Missouri, Kansas & Texas Railway Company of Texas. A judgment for plaintiffs was affirmed by the Court of Civil Appeals (117 S. W. 1043), and defendant brings error. Affirmed.

Coke, Miller & Coke and *Head, Dillard, Smith & Head*, for plaintiff in error.

Wolfe, Hare & Maxey, for defendants in error.

WILLIAMS, J. The defendants in error (plaintiffs), who are the widow and children of R. L. Williams, recovered the judgment under review against plaintiff in error (defendant) for damages in respect of his death, which occurred while he was in the service of the defendant as locomotive engineer in this way: As he was passing the station of Peniel in the engine cab of a freight train, he put his head out of the side window of his cab to see to the working of the injector, which he had just put in operation to force water from the tender into the boiler, when he was struck above the temple near the top of the head by the end of one of the beams of a mail crane near the track, and was instantly killed. That he was acting in the proper discharge of his duty was shown, and is not disputed. The defendant was charged by plaintiffs with negligence (1) in locating the crane too near the track; and (2) in allowing the ties in the track near it to be in such rotten condition as to allow the engine to rock and sway so as to cause the collision. The charge of the court submitted both the issues thus made by the pleadings, leaving it to the jury to say whether or not there was negligence which caused the injury in either respect. The assignments of error assert that the evidence did not justify the submission of either.

With respect to the crane the evidence shows that it was erected by defendant, for its own convenience, to hold mail sacks extended between the ends of its beams, so that they could be taken off by catcher bars reaching out from the mail coaches of moving trains without stopping them. There is evidence to the effect that all that was essential to the proper operation of this contrivance was that the mail sack should be so near the passing train that the end of the catcher bar would extend beyond it. The distance between the end of the beam, contact with which killed Williams, and the side of the mail coaches, which is the same as that between the beam and the side of Williams' cab, and also the distance for which the catcher bar extended outward, were shown, from which it appears mathematically that the beam might have been put further from the sides of the cars and of the cabs of the engines and still have allowed the end of the

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catcher bar to extend beyond the mail sack. The evidence also indicates that these catcher bars are not of uniform length, and that all the cranes are not located the same distance from the track. There is no expert or other evidence than these facts from which the question whether or not the crane was located with proper skill and care can be determined.

Concerning the condition of the track, there is evidence that the ends of some of the cross-ties close to the crane, and on the side of the track nearest it, were so rotten that the rail had sunk into some of them a quarter to a half an inch; that for 20 feet none of the spikes on the inside of the rail nearest to the crane were driven down close against the iron, and some of those on the outside of the rail were in the same condition, and those in the rotten ties stood up an inch and a half or two inches above the flange of the rail; that such condition would cause the engine to lean close to the beam of the crane; and that a witness, observing the movement of an engine by the crane, saw it rock.

The objections urged to the submission of the issues is that the evidence was insufficient to raise any inference of negligence in the location of the crane, and insufficient, also, to justify a finding that the condition of the track proximately caused Williams' death. We have reached the conclusion that the evidence was clearly sufficient upon both points to take the case to the jury. The occurrence itself is sufficiently indicative of negligence on defendant's part to call for an explanation from it, freeing it from such an imputation. The killing of one of its employees while in the proper performance of his duty, by contact with a structure of its own contrivance near the track, strongly indicates a lack of proper care and foresight in the location of the structure, in view of the reasonable presumption that it could have been made consistent with the safety of employees while rendering the ordinary service. The mere adoption of such an expedient for handling the mails would imply that its proper use would not endanger employees so engaged on passing trains, and that a collision would not likely happen when proper care is used in constructing it to make it safe.

It is urged that, without evidence from persons having expert knowledge of the considerations controlling the construction and use of mail cranes, a jury could not find that the construction of that in question was not proper, or even necessary, to its use, since common experience would not yield information upon such a subject sufficient to form the basis of an intelligent judgment. We think the answer to this is that, if any such information could have been given to explain and excuse an occurrence carrying with it such indications as those to which we have referred, that information was in the possession of the defendant, and should be expected to come from it. The facts adduced as to the position of the beam with reference to sides of

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passing cars tend strongly to support the inference of negligence therein, naturally suggested by the manner in which Williams was killed by it; and, if there was a reason hidden from the ordinary mind why this condition of things must have existed, those facts called upon the defendant to make that reason known. *Railroad Co. v. Hewitt*, 67 Tex. 481, 482, 3 S. W. 705, 60 Am. Rep. 32.

The same view sustains the submission of the issue as to the condition of the track. The jury were to find the cause of, and fix the responsibility for, the killing of Williams. The proximity of the crane, or the condition of the track causing an unusual swaying of the engine, or the one helping the other, might explain the occurrence, and thus be found to have been the cause and to fix responsibility on the defendant. Williams was killed in May. One Kerns made a close examination of the track opposite the crane and its surroundings on the 12th of December following, and was permitted to testify to the condition, then existing, of the cross-ties and spikes substantially as we have stated it. It is contended that this and other testimony to like effect was too remote; the condition in December being no proper evidence of the condition in May. The Court of Civil Appeals, in meeting this objection set out testimony which they held to show that the condition was the same at the two dates. The evidence thus set out seemed to be to the general condition of the track at this place, and that there had apparently been no change in such general condition, and not as to the existence in May, or at any other time, of the specific defects found in the track in December; and it was thought by this court, in granting the writ of error, that it did not appear that the witnesses in fact knew of and intended to testify to the previous existence of those defects, since, if they claimed to have observed them, they would naturally have been called upon to state them rather than to make the general statement referred to as a basis for the more specific testimony of Kerns. An examination of the testimony of the witness Roberts, as it is set out in full in the statement of facts, shows, however, that he did testify to frequent observations of the cross-ties and spikes from the time of the accident to December 12th, when he assisted Kerns in making the examination of that date, and to the fact that the condition particularly described by Kerns as then existing had existed all the time. When the question is as to a condition existing at one time, evidence as to that at a different time may furnish no appreciable aid in determining that question. The mere length of time between that in question and that to which the evidence relates may not be decisive, for the reason that some conditions are ephemeral; others permanent or lasting. As to those of the first kind, evidence that they exist at one time might be none whatever that they existed at another time; while the latter kind

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may, by the appearances attending them, indicate with more or less certainty that they have existed long enough to include the time under investigation. The question that arises, therefore, was whether or not the evidence offered tended to show the existence of the defects in the track at the time when Williams was killed with sufficient directness and force to give any reliable help to the jury. The evidence to which we have just referred, showing that the condition was the same at the two dates, makes it unnecessary for us to determine what the decision should be without that evidence. With it the testimony of Kerns simply showed and described with exactness and particularity a condition which the jury could have found from other evidence to have existed when Williams was killed. It was therefore admissible. It follows, also, that this evidence as to the sameness of the condition made admissible that as to the rocking of the engine at the later date.

We have thus disposed of the questions upon which the writ of error was granted. The other questions of law of which alone we have jurisdiction were correctly disposed of by the Court of Civil Appeals.

Affirmed.

HENDRICKSON v. LOUISVILLE & N. RY. CO.

(Court of Appeals of Kentucky, March 11, 1910.)

[126 S. W. Rep. 117.]

Parent and Child—Injuries to Child—Employment—Damages.*—

Where a railroad conductor in charge of a train permitted plaintiff's son, with knowledge that he was under age, to work as a brakeman in a service particularly hazardous, the conductor's knowledge that the son was rendering such service was the knowledge of the railroad company, and hence, while the son assumed the risk of the work in which he voluntarily engaged, his father, not having consented thereto, was entitled to recover from the railroad for care, attention, and loss of service because of the son's injury.

Parent and Child—Injuries to Child—Employment by Railroad Conductor.—Where a railroad conductor permitted plaintiff's son to work on a train as a brakeman, without plaintiff's consent and the conductor knew that the son was under age, it was not material to the

*For the authorities in this series on the subject of the implied authority of agents or employees of railroads to hire others to work for their employees, see foot-note of *Hendrickson v. Wisconsin Cent. Ry. Co.* (Wis.), 33 R. R. R. 340, 56 Am. & Eng. R. Cas., N. S., 340.

For the authorities in this series on the subject of the damages recoverable by a parent for the death of or injury to a child, see foot-note of *Birmingham, etc., Co. v. Baker* (Ala.), 33 R. R. R. 523, 56 Am. & Eng. R. Cas., N. S., 523.

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railroad company's liability to plaintiff for care and loss of service in case of the son's injury, that defendant had furnished the conductor with a full crew, nor was plaintiff required to show that he objected to his son rendering the service; it being sufficient that it was done without plaintiff's consent and with knowledge on the part of the conductor that he was a minor.

Appeal from Circuit Court, Bell County.

"To be officially reported."

Action by John Hendrickson against the Louisville & Nashville Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

O. V. Riley and *W. T. Davis*, for appellant.

Benjamin D. Warfield, *Charles W. Metcalfe*, and *J. W. Alcorn*, for appellee.

HOBSON, J. John Hendrickson brought this suit against the Louisville & Nashville Railway Company. He alleged in his petition that he has a son, James E. Hendrickson, who is under 21 years of age; that the servants of the defendant in charge of one of its trains, knowing that his son was not of age, allowed and directed his son to render services on the train as a brakeman; that the service was hazardous and that all this was done without his knowledge or consent; that, while his son was acting in the capacity of a brakeman on the train, he was thrown from the train and injured; that by reason of his injury his son had been confined to his bed, requiring constant care, nursing, and medical attention; that he had thus been put to great care and expense in taking care of his son to the amount of \$754, and had lost the services of his son which were reasonably of the value of \$250. The defendant filed an answer, the first paragraph of which was a traverse of the allegations of the petition. The second paragraph was in these words: "For further defense it alleges that there was a full complement of men in charge of the train and there was no necessity for the employment or acceptance of the services or rendition of the service of the plaintiff's said son; that the conductor in charge of the train had no right or authority from this defendant to allow or suffer or permit or employ or accept the service of the plaintiff's said son to get aboard said train or ride therein at the time or times mentioned in the petition, or at any time. Wherefore, defendant prays to be hence dismissed with its costs." The plaintiff demurred to the second paragraph of the answer. His demurrer was overruled. The plaintiff stood by his demurrer, and, his petition having been dismissed, he appeals.

It is insisted for the defendant that the petition is insufficient, that the court should have carried the demurrer back to the petition, and that, therefore, the plaintiff cannot complain that

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the demurrer to the answer was overruled. It is said that the petition does not sufficiently charge that the conductor of the train knew that the son was not of age; but, if there was any defect in the petition on this subject, it was cured by the first paragraph of the defendant's answer. The averments of the petition are sufficient to show that the conductor had the son on the train acting as a brakeman. Whether or not the defendant is liable if the conductor had no authority to employ additional help, when he had a full complement of men, and there was no emergency calling for the employment of others, is a question raised by the demurrer to the answer. These matters were set out in the answer, and, if they constituted a defense to the action, the demurrer to it was properly overruled. The defendant relies on the case of *Clark v. Louisville & Nashville Railway Co.*, 111 S. W. 344, 33 Ky. Law Rep. 797. That was a suit by Clark himself for his own injury, where he had been hurt on a train while assisting the train crew by their direction; and it was held that he had voluntarily assumed the service, and that he could not recover unless there was negligence on the part of the train crew. But this action is not brought by the son. It is brought by the father to recover for the injury done to him by the crippling of his son when his son was used as a brakeman on the train, without his knowledge or consent, and with the knowledge on the part of the conductor that he was under 21 years of age. The court in *Cincinnati, etc., R. R. Co. v. Finnell*, 108 Ky. 135, 55 S. W. 902, 22 Ky. Law Rep. 86, 57 L. R. A. 266, and *Thorn-ton v. L. & N. R. R. Co.*, 70 S. W. 53, 24 Ky. Law Rep. 854, decided as in the *Clark Case*, these cases being suits by the infant to recover for his own injury. But in *L. & N. R. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124, which was a suit by the father to recover for the wrongful interference with his infant son, a recovery was allowed. The court stating the basis of the ruling said: "The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over him by the general agent of the appellant at war with the father's rights. The appellant cannot shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was its duty to know that the appellee was willing to it before it took control of him. The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another renders the latter liable at least for any injury that was likely to result from such illegal conduct." It is true that in that case there was only one brakeman on the train, but the opinion was not rested on this fact in any way. It was rested on the broader ground that there

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had been a wrongful interference with the father's rights. The same rule was applied in *N. N. M. V. Co. v. Carroll*, 31 S. W. 132, 17 Ky. Law Rep. 374. These decisions follow the common-law rule which has long been recognized. See 29 Cyc. 1637, 1638, and cases cited. The conductor is the managing agent in charge of the train. While thus in charge of the train and having authority to control it, his act in taking and using the plaintiff's son upon the train as between the plaintiff and the railway company was the act of the railway company. The service of brakeman is peculiarly hazardous. The knowledge on the part of the conductor that the son was on the train and rendering service as brakeman was the knowledge of the defendant. The defendant could not with knowledge of the father's rights thus expose the son knowingly to the dangers of such a hazardous business without his consent. While the son took the risk of the work in which he voluntarily engaged, the father, who did not consent to it, was not affected by this. The conductor, knowing he was acting as brakeman and was an infant, knew there was an interference with the father's rights for the business was intrinsically hazardous; and, when with this knowledge he kept him in the dangerous business, the case is essentially the same as it would be if seeing the boy setting a brake, and, knowing the danger of his undertaking the work, he had signaled the engine to back up for the coupling as in the *Carroll Case*. When the managing agent of the defendant wrongfully takes charge of the servant of another, and, knowing his danger, permits him to be hurt, it cannot escape liability to the master, because under its rules its agent was without authority to hire more men, when he had a full crew. The parent's rights do not depend on whether the conductor had a full crew or not. They rest on the ground that the conductor, who had charge of the train, knew of the wrong to the father's rights and the danger in which the son was placed, and that his knowledge was the knowledge of the defendant.

The plaintiff need not show that the conductor knew that he objected to his son rendering the service. It is sufficient if it was done without the plaintiff's consent. He must show that the conductor knew the son was under 21 years of age. But this he may show by circumstantial evidence or by direct evidence, as knowledge of a fact may ordinarily be shown by proof of facts sufficient to put a man of ordinary prudence on notice of it. *Cutting v. Seaberry*, 1 Spr. 522, Fed. Cas. No. 3,521; *Butterfield v. Ashley*, 6 Cush. (Mass.) 250; *Butterfield v. Ashley*, 2 Gray (Mass.) 254.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

SOUTHERN RY. CO. v. LEWIS.

(Supreme Court of Alabama, Feb. 8, 1910.)

[51 So. Rep. 746.]

Master and Servant—Independent Contractors—Negligence.*—A master, principal, owner, or operator is not liable for the negligence of his independent contractor, and even though he may direct, control, and approve the work which is negligently done.

Master and Servant—Flooding of Land—Independent Contractors—Liability of Master.*—It is no defense to an action for damages from overflow caused by a railroad excavation that the work was done by an independent contractor, where there was no negligence in the work as done, but the injury resulted from the construction of the work itself.

Waters and Water Courses—Flooding Land—Act of God—Defense.†—Where the digging of an excavation by a railroad was unlawful, in that it caused surface waters to flood another's land, which surface waters without the excavation would have gone in another direction, the act of God in sending unprecedented rains was no defense.

Waters and Water Courses—Surface Waters—Drainage—Maxims.—The rights and duties of adjoining landowners as to surface waters and the drainage thereof are different from their rights and duties as to streams of water flowing through their lands, as to which they are riparian owners, though the maxims, "So use your own property as not thereby to injure that of another," and "Water flows, and as it flows, so it ought to flow," apply to both.

Waters and Water Courses—Riparian Rights—Property in.—The property rights of riparian owners in and to the waters bordering on their lands constitute a part of the land, and pass with it by conveyance of the land.

Waters and Water Courses—Surface Waters—Property Rights.—Landowners can have no property rights as to surface waters by virtue of the ownership of the land.

Waters and Water Courses—Surface Waters—Artificial Drains—Rights of Servient Estate.—Natural drains for the drainage of surface

*For the authorities in this series on the subject of the liability of an employer for the negligent or wrongful acts of an independent contractor, see first foot-note of *Thomas v. Wisconsin Cent. R. Co.* (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

†For the authorities in this series on the subject of the liability of a railroad for causing the overflow of the lands of others, see foot-note of *Wallingford v. Maysville, etc., Ry. Co.* (Ky.), 29 R. R. R. 512, 52 Am. & Eng. R. Cas., N. S., 512; *Western Maryland R. Co. v. Martin* (Md.), 33 R. R. R. 397, 56 Am. & Eng. R. Cas., N. S., 397; *St. Louis, etc., Ry. Co. v. Walker* (Ark.), 33 R. R. R. 46, 56 Am. & Eng. R. Cas., N. S., 46; last head-note of *Alabama & M. R. Co. v. Beard* (Miss.), 33 R. R. R. 41, 56 Am. & Eng. R. Cas., N. S., 41; *Blunck v. Chicago & N. W. Ry. Co.* (Iowa), 33 R. R. R. 24, 56 Am. & Eng. R. Cas., N. S., 24.

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waters must be kept open, and the lower estate is subject to the servitude of receiving this water through its accustomed and natural channels, and the owner of land on which surface water comes by nature cannot collect it in artificial drains or ditches and thereby cast it on his neighbor's land, or so near the line that it will thereby naturally flow on to his neighbor's.

Waters and Water Courses—Surface Waters—Artificial Channels.—

The rule that an owner of land on which surface waters come by nature cannot collect it in artificial drains, and so discharge it on the land of his neighbor, does not apply to city or village lots, property for which artificial drainage has been obtained or which through necessity must be so drained, since in such cases the rights of public health are involved.

Waters and Water Courses—Diversion of Surface Water—Flooding Land—Liability.—Where a foundry and coal and coke yard adjoining railroad tracks in a city are flooded by an excavation on the right of way, whereby surface waters which would naturally flow away from the foundry are collected and thrown on to the foundry and its land, and there has been no artificial drainage provided by law, and no necessity therefor, and the excavation is not caused by the building of the city or improvement of a city lot, the railroad cannot contend that the rule that an owner who collects surface waters in an artificial drain thereby flooding another's land is liable for the damages does not apply to city or village lots.

Waters and Water Courses—Flooding Lands—Evidence.—In an action for damages for the flooding of land by the digging of an excavation, evidence is admissible that plaintiff told those excavating that they were too near a ditch, and that it was by reason of the excavation that the banks of the ditch were weakened whereby the water broke through and flooded plaintiff's land, since it showed that the excavation caused the injury, and that defendant had knowledge thereof, and also because it might authorize the giving of punitive damages.

Evidence—Opinion of Witness—Flooding Land.—On an issue whether an excavation caused the walls of a ditch to break in, thereby flooding land, a question to a witness as to whether he left enough bank to hold the water in the ditch, etc., held properly stricken, since it called for the opinion of the witness.

Waters and Water Courses—Flooding Land—Excavation—Repairs.—In an action for damages for the flooding of land alleged to have been caused by an excavation causing the walls of a ditch to break in, evidence that defendant repaired its bank after the third overflow, and that there were no more overflows, is admissible for the purpose of showing that the excavation caused the overflow, and the fact that the evidence was favorable to defendant on the question of damages by showing that the flooding was not continuous would not render it incompetent.

Evidence—Res Gestæ—Flooding Land.—In an action for damages

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for the flooding of land caused by an excavation being made so near a ditch as to break in its walls, conversations had between plaintiff's agent and the one doing the excavation for defendant, relative to the cutting down of the embankment of the ditch made during the progress of the work, were admissible as part of the *res gestæ*.

Waters and Water Courses—Flooding Land—Admissibility of Evidence.—Such evidence was also admissible to show that defendant ought to have known of the damage it would thereby cause plaintiff to suffer.

Appeal from Circuit Court, Calhoun County; A. H. Alston, Judge.

Action by S. A. Lewis against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The complaint was as follows: (1) "Plaintiff claims of the defendant \$250 as damages, for that heretofore, to wit, on and prior to the 7th day of July, 1906, and subsequently thereto, defendant maintained a railroad track or tracks in Anniston, Calhoun county, Alabama; said tracks running in a northerly and southerly direction, and near to a foundry and machine shop and coal and coke yard operated and owned by plaintiff in Calhoun county, Alabama, alongside or near said track or tracks. Plaintiff further avers that shortly prior to the 7th day of July, 1906, defendant caused to be excavated, the lands west of the said track or tracks, and by such excavation the course of the surface drainage of the lands to the north and west of plaintiff's said shop and yard was changed, so that great quantities of water, which otherwise would have flowed away from said property and without injury thereto, were by reason of, and as a proximate consequence of, said excavation caused to overflow plaintiff's said property, and said foundry was flooded. Plaintiff incurred great expense in cleaning up and remedying the results of said flooding. The work in said foundry was stopped for several days on account of said flooding. The coal and coke in plaintiff's yard was washed away in large quantities, and was greatly damaged and depreciated in value by reason of being so flooded and washed away. Great quantities of mud and slush and débris were caused to get mixed with said coal and coke, and great quantities of such material were washed into said foundry, and plaintiff was greatly inconvenienced and incommoded in and about the operation of said foundry and machine shop, and in and about the conduct of said coal and coke yard. Plaintiff further avers that said flooding occurred on, to wit, the 7th day of July, 1906, and plaintiff was damaged as aforesaid on and subsequently to said date." (2) Same as first, down to the last allegation thereof, with the following addition: "Said flooding occurred heretofore, to wit, on the 7th day of July, 1906, and was a separate and distinct flooding from that alleged in the first count." (3) Same as count 1 down to the last paragraph thereof, with the following

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addition: "Said flooding occurred heretofore, to wit, on the 5th day of September, 1906, and was a separate and distinct flooding from that alleged in the first and second counts." The pleas are sufficiently set forth in the opinion.

Knox, Acker & Blackmon, for appellant.

Matthews & Matthews, for appellee.

MAYFIELD, J. This is an action by appellee, a lower landowner, against appellant railroad company to recover damages caused by the flooding of plaintiff's premises. The flooding is alleged to have been caused by the defendant company's excavating, or causing to be excavated, the land to the west of its railroad track, thereby changing the course and flow of the surface drainage of the land to the north and west of plaintiff's land and plant, so that the surface and drainage water from this territory, above plaintiff's land and plant, was made thereby to flow upon and over plaintiff's property to his great damage, etc.; that but for the excavation complained of the water would, and did prior thereto, naturally flow away from plaintiff's property, and not to or over it, as it did after the excavation, with appropriate averments as to damages suffered in consequence thereof. The complaint contained three counts, all alike except that each claimed special damages for a particular and distinct overflow occurring at a different date named therein, caused by an excavation. To the complaint the defendant pleaded the general issue, the statute of limitations of 10 years, contributory negligence, the act of God in sending unprecedented rains, and that the excavation was done by an independent contractor. All of these pleas were stricken from the file, except the general issue, upon which the trial was had, which resulted in a verdict for plaintiff, as to each of three counts, in the aggregate sum of \$300. From this judgment defendant appeals.

The first assignment insisted upon is that the defendant is not liable in this action, because the excavation directing the waters was done by the defendant's independent contractor, and not by it, its agents, or servants. True, the law is, as is insisted by counsel for appellant, that a master, principal, owner, or operator is not liable for the negligence of his independent contractor, and is not so liable though he may direct, control, and approve the work which is negligently done; but it is equally well-settled law that if the work contracted to be done is of itself hazardous or will, in its progress, however skillfully done, be necessarily or intrinsically dangerous, or liable to result in injury to another, or if the law imposes on the master or owner the duty to keep the subject of the work in a safe condition, the owner or conductor is liable, the same as if he performs it himself. Wood on Master & Servant (2d Ed.) p. 603; Cuff's Case, 35 N. J. Law, 17, 10

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Am. Rep. 205; McCary's Case, 84 Ala. 472, 4 South. 630, in which the above and many other authorities are cited. If the work to be done by the contractor cannot be done without danger or injury to third parties, if its very nature and existence is such as to cause or produce danger or injury, the owner, master, or contractor is liable as if he performs it himself. If the work is not necessarily dangerous, and will not, if properly executed, result in danger or injury to third parties, but is rendered so only by the negligent manner in which it is performed, then the owner, master, or operator is not liable, but only the independent contractor. In this case there is no allegation or claim that the work was negligently done. It was the doing of the work in any manner that was alleged to have constituted the wrong. Probably the better it was done the greater was the wrong or injury to the plaintiff. There was no attempt on the part of either party to show that the work was negligently done, or was done in a manner not contemplated, ordered, and directed by the defendant. Hence, as to this action, it was immaterial that the work was done by the defendant's contractor. While the later cases in this state, cited by counsel for appellant, to wit, Martin's Case, 100 Ala. 511, 14 South. 401, Scarborough's Case, 94 Ala. 499, 10 South. 316, Chasteen's Case, 88 Ala. 591, 7 South. 94, and many others not cited, emphasize the rule that the master, owner, or contractor is not liable for the torts, negligence, etc., of the contractor, his agents, or servants, none of them deny the other rule above announced and amplified by Mr. Wood on Master and Servant. Dillon on Municipal Corporations (3d Ed.) § 1029, and McCary's Case, 84 Ala. 472, 4 South. 630. Hence there was no error in the various rulings of the trial court as to the question of law. Windham's Case, 126 Ala. 552, 28 South. 392; Behrman's Case, 136 Ala. 508, 35 South. 132; Coskry's Case, 92 Ala. 254, 9 South. 202; Massey v. Oates, 143 Ala. 248, 39 South. 142.

Partly, but not wholly, for the same reason that the defendant in this case cannot escape liability, because the excavation was done by its independent contractor, it cannot escape liability because the flooding in question was the act of God—that is, unprecedented rains. Had the defendant undertaken and attempted to protect the plaintiff's property from the surface and drainage waters diverted by it, and had done so, and the work of excavating had been necessary and proper and not unlawful in itself, so far as the rights of the plaintiff were concerned, and the plaintiff's property had been injured only on account of the unprecedented rain, the act of God might have been a defense. But where the act itself, as in this case, was unlawful, and the very nature and effect of it was to turn the flood upon the plaintiff, which would have gone in another direction but for the wrongful act, the flood can be no defense, unless it be shown that the injury suffered would have resulted with or without the alleged wrongful act of

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defendant. All rains are in a sense the act of God; and, as all surface water falling in this state is the result of rain—there being very little snow or sleet—the very act complained of here was the turning upon plaintiff's premises of this water (to his damage) which would have gone away from it but for the wrongful act. The greater the rains, the greater the damage. It would indeed be a strange law that would say: "If you do a small damage, you will be liable therefor, but, if you do a very great wrong—greater than was anticipated—the excess will of itself constitute a defense." Could a man who wrongfully tore the roof off his neighbor's house in order to get the shingles to cover his own defend an action brought by his neighbor to recover damages for the destruction and injury of plaintiff's house and household goods by rain, snow or hail, on the ground that the rain, snow, or hail was unusual, unprecedented and excessive—that is, be liable for the damages done by a moderate and usual rain, snow or hail, but not for an unusual and excessive one? We think not. This is, in effect, what defendant sought to do in this case by pleading and attempting to set up the act of God as a defense. The defense is no doubt a righteous one in a proper case, but this is not such a case.

The rights and duties of adjoining landowners as to surface water and the drainage thereof are different from their rights and duties as to streams or water flowing through their lands, as to which streams they are riparian owners. However, some or the same maxims apply to both cases, and upon these most all the law of waters is said to be based, to wit: (1) "So use your own property as not thereby to injure that of another." (2) "Water flows, and as it flows, so it ought to flow." The owners of land bordering upon flowing streams or through which such streams flow, or bordering upon lakes or ponds, or upon which such lakes and ponds are wholly situated, have certain property rights in and to such water by virtue of their ownership of the land. These rights constitute a part of the land, and pass with it by conveyances of the land. But they have no such rights as to surface water. The question as to this is, How may the owner of the land get rid of it? Thus is raised the question of the right of drainage of it. One owner has no right to drain the water off his land and discharge it onto that of his neighbor by purely artificial channels; but he may drain into the natural channels which flow through his own land.

There is some conflict of authority as to whether natural depressions such as washes, gulleys, and ravines must be kept open by the owner, so as to let the surface water go in its accustomed and natural channels across the owner's land. The better or at least the more general rule seems to be that the natural drains must be kept open, and that the lower estate is subject to the servitude of receiving this water through its accustomed and natural channels. However, some courts (but this is not one of

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them) hold that there is no such servitude or duty upon the lower land to receive the surface water flowing naturally onto it, as that the owner may not dam and levy against it and throw it back upon his neighbor. This is sometimes called the "common-law and common enemy" doctrine or rule—probably because these cases and this doctrine denominated surface water as the "common enemy of mankind," and held therefore that every one had a right to fight it as he pleased, without regard to the rights of others. That is, that every landowner could take it off, or keep it off his premises in any manner or by any means he chose, provided he did not go on his neighbor's land to do it. This is one instance in which this state has adopted the rule of the civil law instead of that of the common law. Under this rule this court has repeatedly announced the doctrine that the owner of land on which surface water comes by nature cannot collect it in artificial drains or ditches, and thereby cast it upon his neighbor's land, or so near the line that it will thereby naturally flow on or to his neighbor's; that he cannot change the natural flow of such water so as to divert it onto his neighbor A., whereas naturally it would go onto his neighbor B. The owner has no right to so grade his land or to so erect embankments as to thus turn the natural flow of the surface water, nor can he gather this surface water into a body on his own land, and then discharge it in a body, when without being so collected and discharged it would have been scattered and diffused over greater territory.

There is an exception or a limitation to the rule above announced, and that is, it does not apply to city or village lots, property for which artificial drainage has been obtained, or which, from necessity, must be so drained. This may be necessary under the laws of hygiene. The question of drainage involves not only the private property rights of the owner, but it sometimes involves the rights, health, and wellbeing of the public—in which case the individual rights of the owner yield to the common right of all. But if there be no artificial drainage provided by law, and no necessity therefor, and the land be not the usual city lots for ordinary building purposes, then the reason for the rule ceases, and the rule with it.

We do not think that the case in question falls within the rule that excepts city lots from the general rule of servitude. *Crabtree v. Baker*, 75 Ala. 95, 51 Am. Rep. 424; *Hall v. Rising*, 141 Ala. 433, 37 South. 586; 3 *Farnham on Waters & Water Rights*, p. 2607, § 889e. The work in question, complained of, cannot be said to have been occasioned by the building of a city or the improvement of a city lot, so as to fall within this exception. Each count of the complaint stated a cause of action, and was certainly not subject to any ground of demurrer interposed thereto, and there was abundant evidence to support the verdict and judgment found by the jury under each. It was not necessary that the complaint should allege that the work of excavation was negli-

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gently done. It was sufficient to show that it was wrongfully done and that plaintiff was damaged in consequence thereof.

It was competent for plaintiff to show that he had called to the attention of the persons who were doing the excavating that it was too near the ditch on the road, and to prove that, by reason of it, the banks of the ditch were so weakened that they would not hold the water, and that the banks, in consequence thereof, broke and allowed the water to flow out of the ditch onto plaintiff's premises, to his damage. This evidence was proper, both to show that the excavation complained of caused the injury, and also to show scienter on the part of the defendant that the damage and injury would probably follow the wrong being done. Such evidence might authorize the jury to award punitive damages.

The court properly sustained the objection to the question propounded to the witness Mable, "Did you leave enough bank to hold the water in the ditch," etc. This clearly called for the gratuitous opinion or conclusion of the witness. He should have been required to state the facts, and let the jury draw the conclusions. The undisputed facts answered the question against the contention of the defendant. It was perfectly competent for plaintiff to prove what the railroad company did to the embankment and ditches in question after the third overflow. The fact that this evidence was favorable to defendant, as to the amount of damages recoverable, in that it tended to show that the injury to plaintiff's premises was no longer a continuous one—that there had been no further flooding after the defendant repaired its embankment and ditches—did not render it incompetent. It also tended to show, or was admissible for the purpose of showing, that the overflow was the result of the defendant's excavating, as alleged, and not of some other cause, according to the tendency of some of defendant's evidence. The conversation between plaintiff's agent and Mable, who was doing the excavating in question for the defendant, relative to the cutting down of the embankment of the ditches, made, as it was, during the progress of the work, was admissible as a part of the *res gestæ*, and also to show that the defendant knew, or ought to have known, of the damage and injury it would thereby cause the plaintiff to suffer. This knowledge or notice would tend, or might tend, to show that the act complained of was wantonly done—done with knowledge of the probable consequence, and in utter disregard of plaintiff's rights in the premises. *Windham's Case*, 126 Ala. 560. 28 South. 392.

This disposes of all the assignments insisted upon, and we find no reversible error in these or any others assigned.

The judgment of the court is affirmed.

Affirmed.

ANDERSON, McCLELLAN, and SAYRE, JJ., concur.

HOVELAND *v.* CHICAGO, R. I. & P. RY. CO. *et al.*

(Supreme Court of Minnesota, March 11, 1910.)

[125 N. W. Rep. 266.]

Master and Servant—Injuries to Servant—Hazards Peculiar to Railroad Labor.*—The work of a yard or shop employee, who is injured by the negligent operation of a locomotive under steam and upon the tracks in a roundhouse, is within the hazards peculiar to the operation of railroads.

Master and Servant—Injury to Servant—Evidence.—Evidence considered, and held to sustain a finding that defendants were negligent, and that plaintiff was free from contributory negligence.

(Syllabus by the Court.)

Appeal from District Court, Freeborn County; Nathan Kingsley, Judge.

Action by Martin Hoveland against the Chicago, Rock Island & Pacific Railway Company and another. Verdict for plaintiff, and defendant railroad company appeals. Affirmed.

Morgan & Meighen and *Stringer & Seymour*, for appellant.

Norman E. Peterson and *Dunn & Carlson*, for respondent.

O'BRIEN, J. The plaintiff was employed by the defendant railway as an engine inspector at the company's roundhouse in Albert Lea. On May 19, 1908, it was desired to bring from the house a tender requiring repairs, and for that purpose a road engine which had just arrived was coupled to the rear end of the tender. The men employed in this work were distributed as follows: Roberts, a machinist, entered the pit beneath the tender to uncouple it from the engine to which it belonged; Madeson, a boiler washer, stood opposite Roberts and a few feet from the track. Sander, the hostler who had taken charge of the engine which was to move the tender, occupied the engineer's position in the cab. Hoveland, the plaintiff, claims to have taken a position close to the engine and between the pilot beam and cylinder head. The front end of this engine extended into the house only a few feet, the cab was outside, the door was only of sufficient width to permit the entrance of locomotives, so that by assuming the position described the plaintiff could have walked with or followed the engine through the door. Upon the front of the pilot was a step for employees, and defendants claimed that plaintiff's proper place, if he wished to remain with the engine, was

*See extensive note, 29 R. R. R. 42, 52 Am. & Eng. R. Cas., N. S., 42; Texarkana, etc., Ry. Co. *v.* Anderson (Tex.), 33 R. R. R. 351, 56 Am. & Eng. R. Cas., N. S., 351; Hubbard *v.* Central of Georgia Ry. Co. (Ga.), 31 R. R. R. 769, 54 Am. & Eng. R. Cas., N. S., 769.

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upon this step. The proposed plan of operation was that Roberts could announce when he had completed the necessary preparations, Madeson would repeat to plaintiff, who would signal to Sander to start the engine. The plaintiff's claim is that it was necessary for him to occupy the position he assumed in order that he might see both Madeson and Sander; that if he had stood away from the engine the door jamb would have intervened between him and Sander, and if he had stood upon the pilot step the tender in front would have obstructed his view of Madeson. Some rolls or strips of burlap used to fill the space between the doors and the floor, and thrown to one side when not in use, were on the floor. Plaintiff testified that, when he signaled to move out, Sander started the engine with a jerk and too fast, and while plaintiff was endeavoring to maintain his position and keep up with the engine his feet became entangled in the burlap, and his arm was caught between the pilot beam and the door jamb and injured. The defendants claimed that plaintiff, when he signaled to start the engine, was not where he testified he was, but must have stepped into this confined space after the engine moved, but that in any event, taking that position, rather than upon the step on the pilot, was contributory negligence, and that any hazard incurred from the location of the burlap was voluntarily assumed. It was denied there was any sudden start of the engine, or anything negligent or unusual in its operation, but that it moved slowly, and, finally, that the work was not within the hazards peculiar to railroad operation, and, Sander being the fellow servant of plaintiff, the company was not liable for any injury plaintiff may have sustained through his negligence. The court withdrew from the jury the plaintiff's claim of negligence in reference to the strips of burlap, submitting only the question of negligence in improperly starting the engine. Plaintiff had a verdict, and on this appeal by the railway company the claims of the respective parties as above set out are reiterated.

1. The above summary of the respective contentions of the parties shows that this was, both as to defendants' negligence and plaintiff's contributory negligence, a case for the jury. The evidence would clearly sustain a finding for either plaintiff or defendants, and this court would not be justified in substituting the judgment of its members for that of the jury, which is the body to which the Constitution intrusts the determination of questions of fact in such a case as this. The learned trial judge fully and correctly instructed the jury as to what would constitute negligence upon the part of defendants, and contributory negligence, as well as assumption of risk, by the plaintiff. The claim of negligence in permitting the strips of burlap to remain where they might, and as he claims did, catch plaintiff's feet, was properly withdrawn as a ground for recovery; but the location of the burlap was one of the circumstances properly shown to exist as explaining the incidents connected with the occurrence.

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'2. It is contended that the trial court erred in failing to give certain instructions to the jury, the most important of which was: " * * * That where there are two means of doing an act, by one of which the act may be done with comparative safety, while the other means of doing the act is dangerous, it is the duty of the servant to choose the safer way, unless he is forced to choose the other by stress of circumstances." This was a correct statement of abstract law, although stress of circumstances would include a variety of conditions; but an examination of the general instructions given convinces us that the request was fully covered. The defendants' claim that the plaintiff was not required to place himself in the position he said he occupied was specifically referred to by the court when speaking of plaintiff's conduct, as was also plaintiff's claim that it was necessary for him to occupy that position to give the necessary signals, and we conclude the defendants were not prejudiced by the refusal to give the instruction in the language requested.

3. The jury was instructed, if the defendant Sander was liable, the defendant company was liable as well, which in effect amounted to an instruction that, as a matter of law, plaintiff's employment was within the special hazards of railway operation. In *Tay v. W. & S. F. Ry. Co.*, 100 Minn. 131, 137, 110 N. W. 433, 435, it was said: "And, further, that the statute is to be treated as a remedial one for the benefit of railroad employees, and that it is only in exceptional cases that any railway employee can be excluded from its benefits. Whether a particular case is within the statute is a question of fact for the jury, if the facts are in dispute, or, if admitted, different minds might reasonably draw different conclusions from them." In *Mikkelson v. Truesdale*, 63 Minn. 137, 140, 65 N. W. 260, the following was said: "The plaintiff was injured while assisting in the coaling of an engine by its being negligently moved as he claims by the hostler. If his claim is correct, he was injured by reason of exposures to the hazards peculiar to the operation of railroads." *Nichols v. C., M. & St. P. Ry. Co.*, 60 Minn. 319, 62 N. W. 386. In the case at bar the claim is that the plaintiff was injured because of the negligent manner in which a locomotive was operated, and the court correctly stated the responsibility of the railway company for any negligence by Sander in the operation of the locomotive.

Order affirmed.

FLIEGE *v.* KANSAS CITY WESTERN RY. CO. *et al.*

(Supreme Court of Kansas, March 12, 1910.)

[107 Pac. Rep. 555.]

Master and Servant—Injuries to Servant—Joint Liability.—A manufacturing company sold a machine to a railway company, retaining the title thereto until payment was made, and undertook to furnish a competent engineer to superintend the erection and installation of the machine on the railway company's premises, and the railway company undertook to furnish employees to assist in installing and starting the machine. While the work was in progress an employee of the railway company, acting under the direction of the engineer of the manufacturing company, was negligently injured. Held, that the manufacturing company and the railway company were engaged in a joint operation, and there was imposed on them the joint duty to use due care towards those employed in the work, and, as an employee was injured through the omission or negligent performance of that duty, the companies were guilty of a joint tort, upon which arose a joint and several liability to the injured employee.

Master and Servant—Contributory Negligence—Evidence.—Under the facts in the case, it is held that the employee was not guilty of contributory negligence in not adopting another and safer method of performing the task assigned to him.

(Syllabus by the Court.)

Appeal from District Court, Leavenworth County; J. H. Gillpatrick, Judge.

Action by Henry Fliege against the Kansas City Western Railway Company and the General Electric Company. Judgment for plaintiff, and defendants appeal. Affirmed.

J. E. McFadden and *Lathrop, Morrow, Fox & Moore* (*H. L. Alden*, of counsel), for appellants.

A. E. Dempsey, *Pierre R. Porter*, and *H. W. Wolcott* (*Samuel Maher*, of counsel), for appellee.

JOHNSTON, C. J. This was an action by Henry Fliege against the Kansas City Western Railway Company and the General Electric Company to recover damages for personal injuries alleged to have been negligently inflicted upon him by the two companies. The railway company purchased from the General Electric Company a heavy machine, called a "rotary converter," which was to be installed at a station on the railway company's line, and to that end the electric company was to furnish a competent engineer to have charge of the erection and starting of the engine. The General Electric Company sent W. W. Ray to superintend the installation and starting of the machine, and the

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railway company co-operated in the work and furnished Jeffers, its consulting engineer, Fliege, and other of its employees to assist Ray in the work. In the course of installing the machine they were moving a heavy part of it, called the "field piece," to its place on a metal bed. Across the metal bed some heavy planks had been placed, upon which the field piece rested while being moved to its place. Ray and Jeffers were on one side of this ponderous machine, and Fliege and others upon the opposite side. Jeffers suggested that it was necessary to put another block or wood cushion under the field piece, and Ray directed that it be done. In obedience to the order Fliege procured a scantling and was placing it under the heavy field piece, when Ray and Jeffers, who were standing with crowbars on the other side of the machine, without any notice pried the field piece and pushed it over, thereby catching and crushing Fliege's hand before he had time or opportunity to withdraw it. The reckless action of Ray and Jeffers in shoving this heavy machine over on Fliege when he was underneath and in a position of danger, without warning and without reference to whether he had executed the order and withdrawn to a place of safety, was a clear case of culpable negligence in those who had charge of the work. It was contended by the companies that Fliege was guilty of contributory negligence in failing to adopt a safer method of putting the block under the machine. There is nothing substantial in this contention. Nothing in the machine itself or its position suggested danger to Fliege. He had a right to assume that it would not be moved until the cushion was placed and he had reached a position of safety, and at least would not be moved without giving him notice. It may be that, standing on the other side of the machine, they could not see just when Fliege had completed the task; but that fact only made the duty to warn Fliege more obligatory. Any method of putting the timber under the machine was safe enough, if the ordinary precautions had been taken. The only peril in the case arose from the action of Ray and Jeffers in shoving the machine over upon Fliege while he was under it without giving him warning and an opportunity to protect himself.

After insisting that the injury was not the result of the negligence of either, each of the appellants contends for itself that Fliege was not its servant, and if the injury was negligently inflicted it was the negligence of the other appellant. The railway company contends that under the contract the General Electric Company was to furnish a competent engineer to superintend the installation and erection of the machinery, and in effect was to set up the machine and turn it over complete to the railway company. It contends, further, that Ray did not represent the railway company, was not subject to its orders, and that the employees of the railway company were turned over to and were in fact working for the General Electric Company. On the other

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hand, the General Electric Company insists that Ray was not acting as its employee when Fliege was injured; that he had been merely loaned by the railway company to assist in installing the machinery which that company had purchased, and, although he remained the general servant of the General Electric Company and was paid by it, he was really serving the railway company in doing the work; and that the railway company must answer for his negligence. The attitude of the companies depended upon the contract made in the sale of the machine and their action under it. Some of its provisions are obscure; but, taken together and in the light of other evidence as to its execution, they show that the erection and installation of the machine was a joint undertaking, and that each was responsible for the negligence of the other. The electric company, which sold the machine and retained the title until payment for it should be made, undertook to furnish a competent engineer and help install the machine. This was done for itself, and was more than the mere loaning of an employee to the railway company. It agreed to co-operate in the setting up of the machine. The railway company which had purchased the machine undertook, among other things, to furnish its employees, who were to assist the electric company in installing the machine, and these employees were paid by itself. They acted, it is true, under the direction of Ray; but he, it appears, was in fact a common foreman for both companies in installing the machine. Being a joint undertaking, and both companies having co-operated in an act which directly caused an injury to Fliege, they are jointly and severally liable to him.

It has been said to be "well settled that the law will not undertake to apportion consequences between two or more persons jointly guilty of wrongful conduct toward another, though their contributions to the injury were of unequal degrees and different motives." *Railway Co. v. Durand*, 65 Kan. 380, 69 Pac. 356; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877. In *Old Times Distilling Co. v. Zehnder*, 52 S. W. 1051, 21 Ky. Law Rep. 753, *Hoffman, Ahlers & Co.* contracted to make a heater and place it in the distillery. The foreman of the distillery company directed one of its employees to go and assist in lifting the heater to its place, and it appears that the distillery company had agreed to furnish men to assist in putting the heater in the distillery and was to pay certain employees according to the time employed. It was held that the putting of the heater in the distillery was a joint undertaking of the distillery company and the makers of the heater, and that both parties were liable to a servant of the distillery company, who assisted in the work and was negligently injured while doing so. As the appellants in this case were engaged in a joint operation, there was a joint duty imposed upon them to use due care towards Fliege while he was under the ma-

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chine; and as he was injured through the omission or negligent performance of this duty there was a joint tort, upon which arose a joint and several liability against the companies. As tending to support this view see *American Cotton Co. v. Simmons*, 39 Tex. Civ. App. 189, 87 S. W. 842; *Walton, Witten & Graham v. Miller's Adm'r*, 109 Va. 210, 63 S. E. 458; *Olson v. Phoenix Mfg. Co.*, 103 Wis. 337, 79 N. W. 409; *Consolidated Ice Machine Co. et al. v. Keifer*, 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; *Cleveland, C., C. & St. L. Ry. Co. v. Gossett (Ind.)*, 87 N. E. 723; *Thompson on Negligence*, §§ 5003, 7435; *Cooley on Torts* (3d Ed.) 223; 33 Cyc. 726.

The case appears to have been fairly submitted to the jury as to the liability of either or both of the companies for the injury of the appellee. Whether Fliege was the servant of one or both companies when injured, and their relation to him, depended not alone upon the contract, but also upon the manner in which the contract was executed and the conduct of the companies at the time of the injury. We see no good reason to complain of the instructions, and the objections to rulings on testimony are not deemed to be material.

The judgment of the district court will be affirmed. All the Justices concurring.

ST. LOUIS & S. F. R. CO. v. PHILLIPS.

(Supreme Court of Alabama, Feb. 2, 1910.)

[51 So. Rep. 638.]

Appeal and Error—Assignments of Error—Waiver.—An assignment of error not insisted on in appellant's brief will be treated as waived.

Master and Servant—Injuries to Servant—Complaint—Sufficiency.—A complaint, in an action under Code 1896, § 1749, making a master liable for injuries to a servant caused by any defect in the condition of the ways, works, machinery, or plant, for injuries to a locomotive fireman, which contains a general allegation of defect in the language of the statute, and which counts on the particular defect as a defect in the roadbed or track, sufficiently alleges the particular defect.

Master and Servant—Injury to Servant—Complaint.—A servant bringing an action under Code 1896, § 1749, defining the liability of a master for injury to a servant, may allege in the alternative in the language of the statute every negligence which the statute makes actionable, or he may select one where he is willing to stand on one.

Pleading—General Demurrer.—A general demurrer to a pleading is properly overruled, where each ground of the demurrer assigned is general, for, if there is a defect, the demurrer fails to point it out.

Appeal and Error—Harmless Error—Erroneous Rulings on Demurrers.—Where the substance of a plea is such that if defective it may be

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amended so as to be a good plea, the error in sustaining a general demurrer to the plea is not without injury.

Master and Servant—Injury to Servant—Contributory Negligence—Pleading.—A plea, in an action for injuries to a servant, which states no facts showing any causal connection between the contributory negligence alleged and the injury, is demurrable.

Master and Servant—Injury to Servant—Contributory Negligence—Notice to Master of Defect.—The engineer is not the superior to the fireman in the matter of keeping a proper roadbed, and the fireman, knowing of a defect in the roadbed, is not guilty of contributory negligence for failure to inform the engineer thereof.

Witnesses—Cross-Examination—Extent—Discretion of Court.—The scope which the cross-examination of a witness may take to test his recollection and his knowledge is largely within the discretion of the trial court.

Witnesses—Cross-Examination—Extent—Discretion of Court.—In an action for injuries to a locomotive fireman caused by a defect in the roadbed, a witness for the railroad might be asked on cross-examination whether the track was laid out of light rails, with a view of testing his recollection and his knowledge of the matter.

Exceptions, Bill of—Rulings on Motion to Strike Pleading—Necessity of Including Pleading in Bill.—A bill of exceptions, which sets out the motion to strike pleadings and the rulings thereon, need not contain a copy of the pleadings which are copied into the record.

Pleading—Defective Pleadings—Remedies.—It is the office of a special demurrer to point out the defect in a plea insufficient in law to constitute a valid defense, and thus inform the pleader wherein the insufficiency exists and offer him an opportunity to amend, and a bad plea is not subject to motion to strike.

Master and Servant—Injuries to Servant—Contributory Negligence—Duty of Servant Injured to Remedy Defect.*—Where a car which struck a locomotive fireman, as the engine on which he was riding passed, had been left as it was by those superior in service to the fireman, the car constituted a part of the environment of which the railroad, through its employees superior to the fireman, was bound to take notice in operating the engine; the locating of the cars on the track not being a part of the fireman's duty.

Master and Servant—Injuries to Servant—Contributory Negligence—Defects—Notice to Master.—Where a railroad or its employees superior to a locomotive fireman knew of a defect, it was unnecessary, under Code 1896, § 1749, defining the liabilities of employers for injuries to servants, for the fireman to give notice of the defect.

Trial—Instructions—Requests—Erroneous Instructions.—An instruction, in an action for injuries to a servant, which is defective, in

*See extensive note, 8 R. R. R. 548, 31 Am. & Eng. R. Cas., N. S., 548; last foot-note of McDuffee's *Adm'x v. Boston & M. R. R. (Vt.)*, 29 R. R. R. 467, 52 Am. & Eng. R. Cas., N. S., 467.

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that it hypothesizes no causal connection between the alleged contributory negligence and the injury, is properly refused.

Trial—Question for Jury—Conflicting Evidence.—Where the evidence is conflicting on an issue raised on the pleadings, a general affirmative charge is properly refused.

Master and Servant—Injury to Servant—Contributory Negligence.*—Where it was the duty of a locomotive fireman to keep a lookout for obstructions on or in dangerous proximity to the engine on which he was riding, and he failed to keep a lookout and was injured by a car in close proximity to the engine, there was no liability on account of the placing of the car where it was standing.

Master and Servant—Injury to Servant—Assumption of Risk—Continuance in Service after Promise to Remedy Defect.†—Where an employee while engaged in the service acquires knowledge of any defects in the instrumentalities used and notice thereby of an increased risk of danger, and he afterwards continues in the service without objection or notice to the employer, he assumes the increased risk; but he may notify the employer of the defect and continue in the service for a reasonable time, relying on the promise of the employer to remedy the defect, and, where the defect is not remedied within the proper time, his further continuance in service is at his own risk.

Master and Servant—Injury to Servant—Assumption of Risk—Negligence of Fellow Servant.‡—A locomotive fireman assumes the risk incident to his employment, but not the risk of negligence of a fellow servant in handling the engine on which he is riding.

Trial—Direction of Verdict—When Authorized.—Where a plea did not purport to answer one of the counts of the complaint, that the plea was proven without dispute did not warrant the giving of an affirmative charge.

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Action by J. M. Phillips against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Count 1 was as follows: "The plaintiff claims of the defendant \$5,000 in damages, in this: At the time of the infliction of the injuries herein complained of, on, to wit, the 27th day of April,

See () on preceding page.

†See fourth paragraph of second foot-note of *Thomas v. Wisconsin Cent. Ry. Co.* (Minn.), 33 R. R. R. 609, 56 Am. & Eng. R. Cas., N. S., 609.

‡For the authorities in this series on the question whether the fireman and engineer of the same train are fellow servants, see extensive note. 14 P. R. R. 313, 37 Am. & Eng. R. Cas., N. S., 313; *Pagan v. Southern Ry. Co.* (S. Car.), 28 R. R. R. 254, 51 Am. & Eng. R. Cas., N. S., 254; *Shugart v. Atlanta, K. & N. Ry.* (C. C. A.), 17 R. R. R. 558, 40 Am. & Eng. R. Cas., N. S., 558.

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1906, the defendant was engaged in operating steam locomotives, engines, and cars on its railroad in Walker county, Alabama; that plaintiff was in the employ of defendant on one of its locomotives, and while in the employment of defendant, and performing the duties incident to his said employment, plaintiff was struck on the head by a coke car, and his jaw was broken, and he was made sick and sore. [Here follows a catalogue of his injuries and special damages, coupled with the allegation that he is permanently injured.] All of said wrongs and injuries was suffered by the plaintiff by reason of a defect in the condition of the ways, works, machinery, and plant, used in or connected with the business of the defendant, to wit, a defect in the condition of the roadbed or railroad of defendant's railroad, which defect the defendant had negligently failed to remedy. Plaintiff avers that his said injuries and damages were caused at or near Dora, in Walker county, Alabama."

The demurrers to this count were numerous, and not necessary to be here set out. The following pleas were filed by the defendant: (2) "That plaintiff was guilty of negligence, which proximately contributed to his injury, in this: That he knew that the car upon the side track which struck him was in close and dangerous proximity to the track upon which the engine was passing, and he negligently failed to use ordinary prudence from being struck by said car, while the engine upon which he was riding passed the same." (4) "Defendant says that plaintiff was guilty of negligence, which proximately contributed to his injury, in this: That he was the fireman upon the switch engine at the time of his injury, and that at the time of his injury it was his duty to keep a lookout for obstructions upon or in dangerous proximity to the engine upon which he was riding; but, neglecting this duty, he negligently failed to keep said lookout, and was thereby struck by a car which was in close proximity to the engine upon which he was at the time riding." (5) "Proximately contributory negligence, in this: That at the time of his injury the engine upon which he was riding was backing up, and that it was the duty of the plaintiff to keep an ordinarily prudent lookout to discover obstructions upon or near the track in the direction in which the said engine was going, and as a proximate result thereof he was struck by a car standing on said track, and was thereby injured." (6) "Proximate contributory negligence, in this: The plaintiff knew of the defect or negligence causing his injury, and failed within a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master, and thereby proximately causing his injury." (7) "Proximate contributory negligence, in this: That plaintiff knew, or by the exercise of ordinary care and prudence could have known, of the defect or negligence causing his injury, and failed

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within a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master." (8) "Proximate contributory negligence, in this: That at the time the car upon the side track which struck plaintiff was placed in the position at which it was standing when plaintiff was struck, plaintiff knew where said car was placed, and thereafter passed the said car in the same position in which it was placed safely, by remaining in a safe position upon his engine; but thereafter, while passing said car, the plaintiff negligently protruded his head or body from the engine upon which he was employed, and that while in this position he was struck and injured." (9) "Proximate contributory negligence, in this: That he negligently failed to keep a lookout for obstructions upon or near the track in the direction in which his engine was at the time moving, and he thereby came to his injury."

The demurrer to plea 2 was as follows: "It does not answer all it purports to answer. It is insufficient as an answer to count 1." To plea 4, the following demurrers: "It does not answer all it purports to answer. It is a mere conclusion of the pleader. It fails to show any proximate connection between the failure to keep a lookout therein averred, and the injury to the plaintiff." To plea 5: Same as 4. To plea 6: "It does not appear therefrom that any duty rested on the plaintiff to report any negligence to any one." To pleas 8 and 9: The same as 2. Separate demurrers to 9 the same as to plea 4. Replication 3 to plea 6 is as follows: "For further replication to plea 6, plaintiff says: That any defect or negligence within his knowledge was also known to the engineer of the said engine, in the service or employment of defendant superior to plaintiff, and he was not, therefore, required to report any such negligence or defect."

The third ground of demurrer thereto is: "Knowledge of the engineer of the defects, or negligence, did not excuse plaintiff from reporting the same."

The following charges were refused to the defendant: (1) "The court charges you that you cannot find for the plaintiff on account of the car being left where it was standing when the plaintiff struck it." (2) "The court charges you that you cannot find for the plaintiff on account of the rate of speed at which the engine was running at the time he was hurt." (3) "I charge you that, if you are reasonably satisfied from the evidence that the plaintiff knew of the defect in the track or roadway, and failed for an unreasonable time to give information concerning it to some person superior to himself in the employment of the defendant, then you cannot find for the plaintiff on the count charging the defect in the condition of the track or roadway." (4) Affirmative charge as to the fifth count. (5) "If you believe from the evidence that plaintiff negligently failed to keep a look-

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out for obstructions upon or near the track in the direction in which the engine was moving, you cannot find for the plaintiff on account of the position of the car on the adjoining track.”

(6) General affirmative charge. (7) Affirmative charge as to the first count. (8) Affirmative charge as to the second count.

(9) “The court charges you that, if you believe from the evidence that at the time of his injury it was plaintiff’s duty to keep a lookout for obstructions upon or in dangerous proximity to the engine upon which he was riding, but that he failed to keep said lookout, and was thereby struck by a car which was in close proximity to the engine upon which he was at the time riding, you cannot find a verdict for the plaintiff on account of the placing of a car where it was standing.” (10) “If the jury believe from the evidence that the plaintiff had knowledge of the defective condition of the roadway or track, and of the dangers of riding over the same on an engine, and the plaintiff continued to ride over the same on an engine until he was hurt, you cannot find a verdict for the plaintiff on account of the defective condition of the roadway or track.” (11) “The court charges you that the plaintiff assumed all the risk and dangers incident to working on a locomotive engine.”

Bankhead & Bankhead, for appellant.

G. O. Chenault and *W. L. Chenault*, for appellee.

EVANS, J. Appellee brought suit against appellant for damages for personal injuries. Appellee was a locomotive fireman in the employ of appellant in Walker county, Ala., at the time of the injury complained of. The suit was brought under section 1749 of the Code of 1896. There are 30 assignments of error by appellant to the rulings of the court below. In his brief appellant does not insist upon assignments 1, 2, 3 (3a), 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 22. We, therefore, treat those assignments as waived.

The demurrer to first count was properly overruled. Said count, as to its general allegation of defect, was in the language of the statute under which the suit was brought; and was, therefore, sufficient. After the general allegations of defect, in accordance with the language of the statute, the particular defect counted upon is alleged as follows: “A defect in the roadbed or track of defendant railroad.” Under the authority of *Jackson Co. v. Cunningham*, 141 Ala. 206, 37 South. 445, that was a sufficient allegation of the particular defect. The negligence counted upon in said count was as follows, after naming the defect: “Which defect the defendant had negligently failed to remedy.” This allegation of negligence is one of several acts of negligence, which the statute, by its terms, makes actionable. It was, therefore, sufficient. The plaintiff might have alleged in the alternative, in the language of the statute, every negligence which the statute

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makes actionable; or he might select one, if he is willing to stand upon that one, as was done in this case. If count 1 was subject to either ground of demurrer, it was to the third ground, and that was cured by the subsequent amendment.

The demurrers to pleas 2 and 8 as answers to count 1 were general demurrers. Each ground assigned was general. For this reason, if for no other, the demurrers should have been overruled. If there was a defect in either of said pleas, it was not pointed out by the demurrers. The substance of each plea is such that, if defective, it could have been amended so as to make it a good plea. We cannot, therefore, say that it was error without injury to sustain said general demurrers. The court, therefore, erred in sustaining said demurrers. *Shahan v. A. G. S. R. R. Co.*, 115 Ala. 190, 22 South. 449, 67 Am. St. Rep. 20.

We are of opinion that the demurrers to pleas 4, 5, and 9 were properly sustained. There were no facts stated to show any causal connection between the negligence alleged and the injury. *Osborne, Adm'x v. Ala. Steel Co.*, 135 Ala. 575, 33 South. 687; *Tenn. Coal & Iron Co. v. Herndon*, 100 Ala. 451, 14 South. 287; *L. & N. R. R. Co. v. Markee*, 103 Ala. 160, 15 South. 511, 49 Am. St. Rep. 21.

The third ground of demurrer to replication No. 3 to plea No. 6 should have been sustained, as the engineer was not superior to the fireman in the matter of keeping a proper roadbed. As this work was outside the duty of either the fireman or engineer, there could be no question of superior or inferior between them in reference thereto.

On cross-examination of defendant's witness John Bottoms, the plaintiff asked the said witness the following questions: "Is it a fact that the track is laid out of light rails?" The defendant objected to the question upon the general grounds that it called for irrelevant, immaterial, and illegal evidence. The court overruled the objection, and the defendant excepted. The scope which the cross-examination of a witness may take to test his recollection and his knowledge of the matter being inquired into is largely within the discretion of the trial court. *Tobias & Co. v. Treist & Co.*, 103 Ala. 670, 15 South. 644; *Noblin v. State*, 100 Ala. 13, 14 South. 767; *Rhodes Fur. Co. v. Weeden*, 108 Ala. 252, 19 South. 318. There was no reversible error in allowing said question to be asked. In fact, we are of opinion that the question was, on cross-examination, entirely permissible, and the court committed no error in allowing the same over the objection of defendant.

The twenty-fourth, twenty-fifth, and twenty-sixth assignments of error are to the ruling of the court in striking pleas 3, 7, and 12, upon motion of plaintiff. It is insisted by counsel for appellee that the action of the trial court cannot be here considered for the reason that these pleas are not set out in the bill of ex-

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ceptions. We concede that such was the effect of the ruling of this court in the case of *Ætna Life Ins. Co. v. Lasseter*, 153 Ala. 630, 45 South. 167, 15 L. R. A. (N. S.) 252. In several other decisions of this court, where this question was not squarely before the court, it is intimated that it is necessary, where motion is made to strike a pleading from the file, that the motion, pleading, and the ruling of the court thereon must appear in the bill of exceptions before this court can consider the same. But, upon careful consideration of this question, we are of opinion that, where the bill of exceptions sets out the motion and the ruling of the court thereon, it is not necessary to copy the pleading into the bill of exceptions, provided the pleading is copied into the record, as it should be, and is sufficiently designated in the motion, so that there can be no doubt as to the particular pleading which the motion asks to be stricken. We therefore overrule the case of *Ætna Life Ins. Co. v. Lasseter*, 153 Ala. 630, 45 South. 167, 15 L. R. A. (N. S.) 252, so far as this rule is concerned, and confine the other cases to the facts of those cases, where this question does not directly appear, and which intimate that pleadings must, in all cases, be set out in the bill of exceptions, where motion has been made to strike them, before this court can consider them.

The motion to strike pleas 3, 7, and 12 should have been overruled, as they were neither unnecessarily prolix, irrelevant, or frivolous. "If the facts stated in these pleas were insufficient, in law, to constitute a valid defense to the action, it was the office of a special demurrer to point out the defect, and, by so doing, inform the pleader wherein the insufficiency existed, thereby affording an opportunity of amendment." *A. G. S. R. Co. v. Clark*, 136 Ala. 461, 34 South. 920. These pleas were evidently bad, but not subject to motion to strike. The plaintiff should have pointed out the defect by demurrer, so that the defendant might amend if he saw proper.

Charge 1 was defective and was properly refused. The locating of the cars upon the side track was not, according to the evidence, a part of plaintiff's duty. The car having been left as it was, by those superior in service to plaintiff, constituted a part of the environment, of which defendant, through its employees superior to plaintiff, was bound to take notice in operating said engine. An act which might not have been dangerous, or even negligent, but for said car being so placed, might become highly dangerous and negligent with said car so placed.

Charge 2 was properly refused, as it was for the jury to determine whether, under all the circumstances, it was negligent conduct on the part of the engineer to run the engine at the rate of speed it was run.

Charge 3 was defective because, if defendant or its employees who were superior to plaintiff knew of the defect alleged, it was unnecessary, by the terms of the statute, for the defendant to give them notice thereof. It was, therefore, properly refused.

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Charge 5 was defective in that it hypothesized no causal connection between the alleged negligence of plaintiff and the injury received by him, and was, therefore, properly refused.

Charges 4 and 8 were properly refused, as the evidence was in conflict upon the issues raised upon the pleadings to counts 2 and 5.

Charge 9, when considered in connection with plea 14, should have been given, as it hypothesizes the substantial averments of said plea.

Charge 10 was bad for the reason that, as a matter of law, the charge states the proposition of assumption of risk by plaintiff too broadly. In the case of *L. & N. R. R. Co. v. Stutts*, 105 Ala. 376, 17 South. 31 (53 Am. St. Rep. 127), it is said: "If the employee while engaged in the service acquires knowledge of any defects in the materials, machinery, or instrumentalities used, and notice thereby of an increased risk of danger, and afterwards continues in the service, without objection or notice to the employer, he assumes the increased risk himself; but he may notify the employer of the defect, and continue in the service for a reasonable time, relying on the promise of the employer to remedy the defect. Yet, if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence." On comparing this charge with the law as just quoted, it will be seen that the charge is too broad. The law as stated shows that there is a condition under which an employee might continue for a reasonable time after discovery of defects without assuming the extra risk.

Charge 11 was too broad in its statements, or, at least, misleading; and was properly refused. He undoubtedly assumed the risk incident to his employment, but his was not the only employment on the engine. Nor did he assume the risk of negligence of a fellow servant in handling the same.

The appellant insists that the affirmative charge should have been at the request of appellant because, as he says, plea 13 was proven without dispute. It is sufficient answer to this argument to say that plea 13 did not purport to answer count 1 of the complaint. It was therefore properly refused.

For the errors pointed out, the cause is reversed and remanded.

Reversed and remanded.

DOWDELL, C. J., and SIMPSON, ANDERSON, McCLELLAN, MAYFIELD, and SAYRE, JJ., concur.

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- Claim for damages shall be filed with carrier's agent within five days from date of removal of stock from cars, waiver of condition that. *Cleveland, etc., Ry. Co. v. Rudy* (Ind.), 121.
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Duty to stop train a reasonable time for passengers to have time to board it. *Chesapeake & O. Ry. Co. v. Austin* (Ky.), 716.

Engineer's failure to stop train at flag station merely on signal of prospective passenger is not negligence. *St. Louis, etc., R. Co. v. Garner* (Miss.), 185.

Negligence of conductor in giving signal for starting street car without going where he can see whether any one is boarding is question for jury, though the car has made a reasonably long stop. *Ryan v. Pittsfield Elec. St. Ry. Co.* (Mass.), 446.

Where train stopped the reasonable and usual length of time for passengers to board it, and a passenger failed to present himself at the train, he cannot recover for being left at the station, though he failed to present himself by reason of the crowd at the station. *Chesapeake & O. Ry. Co. v. Austin* (Ky.), 716.

Refusal to Transport.

If street car company waived its rule prohibiting passengers from bringing large and unwieldy articles into car by permitting a passenger to bring a graphophone horn into the car with him, it will be liable to punitive damages for afterwards refusing to allow plaintiff to become a passenger with a graphophone horn. *Vlasservitch v. Augusta & A. Ry. Co.* (S. Car.), 721.

Rules and Regulations.

Waiver of rule prohibiting passengers from bringing large and unwieldy articles into street cars. *Vlasservitch v. Augusta & A. Ry. Co.* (S. Car.), 721.

Seats, duty of carrier to furnish. *Chesapeake & O. Ry. Co. v. Austin* (Ky.), 716.

Separation of Colored Passengers.

Burden of proof was on plaintiff to establish that his children belonged to white race; and, under the statute in question, any person, who has any applicable mixture of negro blood belong to the "colored race." *Lee v. New Orleans G. R. R. Co.* (La.), 151.

Conductor is not justified in ordering or compelling white passengers in negro coach to go into another coach while train is moving at dangerous rate of speed. *Central of Georgia Ry. Co. v. Carleton* (Ala.), 511.

Under statute requiring white and colored passengers to be carried separately, carrier is guilty of an actionable wrong in requiring white person to ride in colored coach. *Chesapeake & O. Ry. Co. v. Austin* (Ky.), 716.

Where a white passenger was not directed to ride in the colored coach, and remained on the train knowing its crowded condition, he cannot complain because the only seat he could get was in the colored coach. *Chesapeake & O. Ry. Co. v. Austin* (Ky.), 716.

CARRIERS OF PASSENGERS—Continued.**Speed.**

Carrier operating train at ordinary speed is not liable to passenger thrown from back platform, on which he was riding, while train was on a curve, on ground of dangerous speed. *Crawford v. Louisville & N. R. Co. (Ky.)*, 171.

Stopping Places.

Duty of carrier to put passengers off at safe places. *Cossitt v. St. Louis, etc., Co. (Mo.)*, 501.

Railroad which had for many years allowed passengers to board and alight from trains at unlighted coal chute was negligent in not maintaining railing across mouth of the chute. *Credle v. Norfolk & S. R. Co. (N. Car.)*, 495.

Sufficiency of complaint which alleges that decedent was a passenger, and that his death was proximately caused by negligence of trainmen in and about the carriage of decedent as a passenger. *Central of Georgia Ry. Co. v. Carleton (Ala.)*, 511.

Warn and Instruct.

Where street car passenger was injured by placing his hand on the partially open door of the car as he was about to enter it, it could not be ruled, as matter of law, that the conductor was not bound to warn him against the danger of doing so. *Carter v. Boston & N. St. Ry. Co. (Mass.)*, 697.

Water-Closets.

Carrier need not anticipate that passenger will jump from train and wander about station premises, in the dark, to a place not ordinarily used by passengers for the purpose of responding to a call of nature. *Louisville & N. R. Co. v. Turner (Ky.)*, 712.

Carrier was not liable for injuries sustained by passenger from fall into unguarded culvert, since direction of conductor to him to jump from train any where in the dark, at a station, to respond to a call of nature, was not an implied assurance that the passenger would find the premises safe. *Louisville & N. R. Co. v. Turner (Ky.)*, 712.

Rule prohibiting the opening of water-closets on trains at stations is reasonable. *Louisville & N. R. Co. v. Turner (Ky.)*, 712.

Who Are Passengers.

Holder of ticket attempting to board train on its arrival at station. *Williford v. Southern Ry. Co. (S. Car.)*, 693.

Intoxicated passengers struck by another train, after alighting, while walking on track. *Pinson v. Southern Ry. (S. Car.)*, 700.

Mail clerks. *Barker v. Chicago, etc., Ry. Co. (Ill.)*, 470.

Persons who, in ignorance of carrier's rule whereby entrance to a street car could be had by the rear right hand door only, and the other door of the other vestibule was kept locked, got on the rear left-hand steps leading to such vestibule, for the purpose of becoming a passenger. *Yancy v. Boston Elev. Ry. Co. (Mass.)*, 705.

Question for jury whether person had become a passenger when he was injured by mortorman suddenly opening car door wider. *Carter v. Boston & N. St. Ry. Co. (Mass.)*, 697.

Where street car had come to full stop in response to plaintiff's signal, it was not necessary, to constitute carrier's assent to plaintiff's becoming a passenger, that the car door should be entirely open to permit him to enter. *Carter v. Boston & N. St. Ry. Co. (Mass.)*, 697.

CHILDREN.**Damages.**

Father was entitled to recover from railroad for care, attention

CHILDREN—Continued.

- and loss of service because of his son's injury, sustained while he was being permitted to work as brakeman by conductor, without his father's consent. *Hendrickson v. Louisville & N. Ry. Co. (Ky.)*, 774.
- No duty on railroad to load its cars with reference to presence of boys playing on its private premises, or to inspect its cars to see that such boys are not injured by falling coal; and there is no liability for injuries so occurring in absence of wantonness. *Covington, etc., Co. v. Mulvey's Adm'r (Ky.)*, 11.
- Railroad was liable to the father on account of injury sustained by his minor son while latter was working as brakeman by permission of conductor. *Hendrickson v. Louisville & N. Ry. Co. (Ky.)*, 774.
- Where conductor permitted plaintiff's son to work on train as brakeman, without plaintiff's consent, it was not material to the railroad's liability to plaintiff in case of the son's injury, that the company had furnished the conductor with full crew. *Hendrickson v. Louisville & N. Ry. Co. (Ky.)*, 774.
- Where conductor permitted plaintiff's son, with knowledge that he was under age, to work as brakeman, the conductor's knowledge that the son was rendering such service was the knowledge of the railroad company and rendered it liable for his injury. *Hendrickson v. Louisville & N. Ry. Co. (Ky.)*, 774.

COMMON CARRIERS.**Authority to Forward.**

Carrier has no right, without authority from consignee, to deliver freight has not been paid, it is no. *Cleveland, etc., Ry. Co. v. Rudy (Ind.)*, 121.

Beginning of Liability.

Acceptance by carrier of portion of shipment loaded on car and destroyed by fire, evidence did not show. *Burrowes v. Chicago, etc., R. Co. (Neb.)*, 373.

To render transportation company liable as common carrier for loss or destruction of goods, they must have been delivered to and accepted by it for transportation. *Burrowes v. Chicago, etc., R. Co. (Neb.)*, 373.

Damages.

Crediting carrier with proceeds of sale of goods for benefit of consignee's creditors. *Chesapeake & O. Ry. Co. v. Lavin (Ky.)*, 358.

Defense to action against carrier for damages to goods that the freight has not been paid, it is no. *Cleveland, etc., Ry. Co. v. Rudy (Ind.)*, 121.

Degree of Care.

Liability of common carrier as insurer. *Pittsburg, etc., Ry. Co. v. Chicago (Ill.)*, 380.

"Public enemy" does not include mobs, the term. *Pittsburg, etc., Ry. Co. v. City of Chicago (Ill.)*, 380.

Delay.

Burden on carrier of showing special excuse for delaying transportation. *McMillan v. Chicago, etc., Ry. Co. (Iowa)*, 396.

Constitutionality of statute imposing penalty on railroads for delay in transporting freight. *Thweat v. Atlantic Coast Line R. Co. (S. Car.)*, 431.

Failure of carrier to move car load of lumber, after it is ready for shipment and notice thereof, renders it liable for the loss of the

COMMON CARRIERS—Continued.

lumber by its subsequent destruction in the burning of adjacent property without carrier's fault. *Green v. Louisville & N. R. Co. (Ala.)*, 133.

Discrimination.

Penal statute requiring railroads to receive and transport without discrimination tonnage, etc., construction of. *Thompson v. Missouri, etc., Ry. Co. (Tex.)*, 606.

Prepayment of freight charges required of some shippers and not of others. *Brown & Brown Coal Co. v. Grand Trunk Ry. Co. (Mich.)*, 432.

Waiver of right to insist that certain change in routing of freight was an unjust discrimination, under Texas Rev. St. 1895, arts. 4574, 4575. *Thompson v. Missouri, etc., Ry. Co. (Tex.)*, 606.

Word "deliver" in Texas Rev. St. 1895, arts. 4574, 4575, providing that a railroad company which refuses to transport and "deliver" without discrimination tonnage, etc., destined to any point on or over the lines of any connecting line, shall be subject to a penalty, must be construed to mean more than physical delivery, and hence the fact, that the freight was delivered to the designated connecting carrier, but not controlled and routed on its own line because of the action of the initial carrier was a discrimination by the latter for which the penalty was recoverable. *Thompson v. Missouri, etc., Ry. Co. (Tex.)*, 606.

Duty to Furnish Facilities.

In determining the obligation of a railroad in the discharge of its duties to the public, the corporate business as a whole, the character of the service required, the need of its performance, and the various rights of the public and the carrier should be considered. *State v. Florida E. C. Ry. Co. (Fla.)*, 423.

Evidence.

Car record made by freight conductors was admissible to show arrival of large number of plaintiff's cars at its yard during a certain period, over objection that it was secondary evidence. *Pittsburg, etc., Ry. Co. v. Chicago (Ill.)*, 380.

Foreign Cars.

Liability of carrier using car of refrigerator company for transportation of perishable goods for loss caused by negligence in failing to keep drain holes of the car open. *Gibson & Draughn v. Little Rock, etc., Ry. Co. (Ark.)*, 690.

Railroad occupies same relation to cars of other carriers received by it for transportation over its line as to ordinary freight, and is liable to owner of such cars in same manner as to any other shipper. *Pittsburg, etc., Ry. Co. v. Chicago (Ill.)*, 380.

Limiting Liability.

Acceptance of bill of lading, stipulating that no carrier or party in possession of property should be liable for loss or damage by causes beyond its control or by floods or fire, effect of. *Central of Georgia Ry. Co. v. Burton (Ala.)*, 685.

Burden of proving that loss or damage to goods in shipment was without fault or negligence of carrier, so as to exempt it from liability under the bill of lading. *Central of Georgia Ry. Co. v. Burton (Ala.)*, 685.

Burden on carrier of proving, not only the making of special contract, but also that the loss or injury for which the action is brought falls within a specified exemption contained in such special contract. *Patterson v. Missouri, K. & T. Ry. Co. (Okl.)*, 410.

COMMON CARRIERS—Continued.

Damages caused by negligence. *Stringfield v. Southern Ry. Co.* (N. Car.), 624.

Provision in contract of shipment limiting liability to agreed amount is invalid where the injury is caused by carrier's negligence. *Stringfield v. Southern Ry. Co.* (N. Car.), 624.

Public policy forbids common carrier from exempting itself by contract from damages for loss by its own negligence. *Kansas City So. Ry. Co. v. Carl* (Ark.), 406.

Under S. Dak. Civ. Code, § 1583, a carrier cannot be exonerated by any agreement, made in anticipation thereof, for gross negligence. *Berry v. Chicago, etc., Ry. Co.* (S. Dak.), 615.

Ownership of Goods.

Where seller delivers article to carrier for transportation by usual route on an open bill of lading, title passes to vendee or assignee, so that seller could not sue for their injury en route unless he specifically retained title by requiring the goods to be delivered to his order. *Gaskins v. Southern Ry. Co.* (N. Car.), 350.

Parties.

Common carrier may recover full value of freight from one who destroys it, though its owner might also have an action against the wrongdoer. *Pittsburg, etc., Ry. Co. v. Chicago* (Ill.), 380.

Right of action for delay in shipment. *Parker Buggy Corp. v. Atlantic Coast Line R. Co.* (N. Car.), 635.

Right of action for delay in shipment where seller ships goods on an ordinary open bill of lading, in which the buyer is designated as the consignee. *Parker Buggy Corp. v. Atlantic Coast Line R. Co.* (N. Car.), 635.

Termination of Liability.

After arrival of goods at destination. *Knight v. Southern R. Co.* (S. Car.), 393.

Carrier need not give notice that goods must be removed within a particular time, nor that a charge will be made for storage unless they are promptly removed, in order that its liability as insurer may cease. *Knight v. Southern R. Co.* (S. Car.), 393.

Certain statute did not lay upon carrier the duty to notify consignee but merely determined the time of termination of the strict liability of the carrier. *Central of Georgia Ry. Co. v. Burton* (Ala.), 685.

Custom of carrier at destination of goods to give notice of their arrival merely affected the time of termination of the liability of the common carrier, as such, and did not impose upon it the positive duty to give such notice. *Central of Georgia Ry. Co. v. Burton* (Ala.), 685.

Evidence did not show a custom extending railroad's liability as common carrier for goods ready for delivery at destination. *Knight v. Southern R. Co.* (S. Car.), 393.

Reasonable time for removal of goods by consignee. *Central of Georgia Ry. Co. v. Burton* (Ala.), 685; *Knight v. Southern R. Co.* (S. Car.), 393.

Reasonable time for removal of goods is one of law, when question of what is. *Knight v. Southern R. Co.* (S. Car.), 393.

Under certain statutes, where the conditions prescribed thereby do not exist, there is not primary duty on carrier to give notice of arrival of goods, in order to terminate the strict liability of a common carrier, unless a proper custom to the contrary then prevailed at destination. *Central of Georgia Ry. Co. v. Burton* (Ala.), 685.

COMMON CARRIERS—Continued.

Upon the consignee's failure to call for the goods in question, the carrier could not withhold possession thereof from the seller until payment of freight and demurrage charges, since a person cannot be divested of his personal property without his consent. *Corinth Engine & Boiler Works v. Mississippi Cent. R. Co.* (Miss.), 353.

Warehousemen.

Beginning of carrier's liability as warehouseman after arrival of goods at destination. *Knight v. Southern R. Co.* (S. Car.), 393.

CONCURRING NEGLIGENCE.

See CARRIERS OF PASSENGERS.

CONNECTING CARRIERS.

See RAILROAD COMMISSIONS.

Agents of transfer company as agents of connecting carrier in the sense that it is only through them that it can be advised that a car is ready for transportation by it. *McMillan v. Chicago, etc., Ry. Co.* (Iowa), 396.

Authority to Forward.

If it is the custom for the carrier to forward goods by boat from their destination on its line, and the consignee knew this when he ordered the goods shipped, and the owner of the boat had previously received goods for him from the carrier and delivered them, the carrier is authorized to deliver the goods to such owner for transportation by boat to the consignee. *Chesapeake & O. Ry. Co. v. Lavin* (Ky.), 358.

Delivery to Carrier.

Car is delivered to connecting carrier when it is placed on its transfer track, and it is notified of that fact. *McMillan v. Chicago, etc., Ry. Co.* (Iowa), 396.

Delay.

Common carriers's liability for negligence of connecting carrier in delaying a shipment of live stock. *Carter v. Chicago, etc., R. Co.* (Iowa), 362.

Initial carrier's liability for delays of a connecting carrier, under bill of lading for transportation to destination beyond former's line. *Carter v. Chicago, etc., R. Co.* (Iowa), 362.

Designate route, right of shipper to. *Thompson v. Missouri, etc., Ry. Co.* (Tex.), 606.

Duty to Transport.

Connecting carrier must accept and transport cars delivered to it for transportation without waiting for the making of a new contract. *McMillan v. Chicago, etc., Ry. Co.* (Iowa), 396.

Evidence was insufficient to show any contract or partnership or traffic agreement between the two carriers in question so as to render initial carrier liable for injuries from negligence of the connecting carrier. *Carter v. Chicago, etc., R. Co.* (Iowa), 362.

Limiting Liability.

Certain statute made invalid all contracts limiting a carrier's liability for loss of freight, and an initial carrier could not contract to limit liability of connecting carrier. *Kansas City So. Ry. Co. v. Carl* (Ark.), 406.

Initial carrier is liable, under certain provision of the "Hepburn Act," for its own negligence or that of connecting carriers, resulting in the delay in transportation of cattle by reason of which they failed to reach their destination within reasonable time, whether they were shipped under an oral or under a writ-

CONNECTING CARRIERS—Continued.

ten contract attempting to limit the carrier's liability for its own acts or delays occurring on its own line. *Chicago, etc., Ry. Co. v. Miles (Ark.)*, 135.

Presumption that goods were lost en route by negligence of last carrier. *Kansas City So. Ry. v. Carl (Ark.)*, 406.

Presumption that injury to goods was caused by last carrier. *Gibson & Draughn v. Little Rock, etc., Ry. Co. (Ark.)*, 690.

The Hepburn amendment makes the initial carrier liable for an injury to an interstate shipment, but the connecting carrier is also liable if the injury is the result of its negligence. *Gibson & Draughn v. Little Rock, etc., Ry. Co. (Ark.)*, 690.

Termination of Liability.

Acceptance of goods by a carrier, marked to a point beyond the terminal of its line creates a prima facie liability to deliver at point of destination. *Carter v. Chicago, etc., R. Co. (Iowa)*, 362.

Contract for through shipment may be upheld from the circumstances of the shipment, but the mere fixing of a through rate, and the collection thereof, will not justify the inference. *Carter v. Chicago, etc., R. Co. (Iowa)*, 362.

Evidence was insufficient to show any agreement by the carrier receiving the shipment of live stock in question to deliver them at the stockyards, a point beyond its own terminal. *Carter v. Chicago, etc., R. Co. (Iowa)*, 362.

Where bill of lading showed the destination of property to be a certain city, this meant, in absence of custom or usage to the contrary, the terminal of the carrier's line in that city. *Carter v. Chicago, etc., R. Co. (Iowa)*, 362.

CONSTITUTIONAL LAW.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS; DAMAGES; EMPLOYERS' LIABILITY ACTS; INTER-STATE STATE COMMERCE; STATIONS AND DEPOTS; TAXATION.

Right of a state to direct a railway company operating branch line which, so far as it lies within the state, was built under the authority of a charter from the state, to afford passenger train service between the terminus of such line within the state and the state line. *Missouri Pac. Ry. Co. v. Kansas (U. S.)*, 728.

Whether duty of railway to furnish passenger service is so completely discharged by carrying passenger on a mixed train as to cause an order of the Kansas railroad commission, compelling passenger train service at a pecuniary loss, to be so unreasonable as to take property without due process of law. *Missouri Pac. Ry. Co. v. Kansas (U. S.)*, 728.

CONTRACTS.

See CARRIERS.

CONTRIBUTORY NEGLIGENCE.

See ACCIDENTS ON TRACKS; CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; IMPUTED NEGLIGENCE; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS; STATIONS AND DEPOTS; TRESPASSERS.

Court cannot charge what particular facts would constitute contributory negligence. *Martin v. Columbia, etc., Co. (S. Car.)*, 285.

Emergencies.

It is not necessarily negligence to take the more dangerous of several means of escape when suddenly compelled to act in a dangerous position. *Bruggeman v. Illinois Cent. R. Co. (Iowa)*, 241.

CONTRIBUTORY NEGLIGENCE—Continued.

Question for jury or question of law for the court. *Patterson v. Missouri, K. & T. Ry. Co.* (Okl.), 410.

CORPORATIONS.

See TAXATION.

CRIMINAL LAW.

See RECEIVERS.

CROSSINGS.

See DAMAGES; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; RAILROADS IN STREETS; STATIONS AND DEPOTS; STREET RAILWAYS.

Although injury to highway traveler was avoidable notwithstanding his contributory negligence, railroad will not be liable for his injury if trainmen's failure to avoid injuring him resulted from a defect in appliances of the train, which existed previously, and which made it impossible to stop the train in time. *Illinois Cent. R. Co. v. Nelson* (C. C. A.), 257.

Contributory Negligence.

Action was properly dismissed by trial court on ground of contributory negligence. *Schanno v. St. Paul City Ry. Co.* (Minn.), 94.

Evidence justified finding that decedent saw flagman and relied on his invitation to cross. *Wiggin v. Boston & M. R. R.* (N. H.), 577.

Evidence showed that decedent was guilty of contributory negligence in attempting, without any precaution, to cross track ahead of street car approaching at full speed. *West v. Detroit United Ry.* (Mich.), 102.

Fact that traveler has right to assume that train will not approach at unlawful speed does not relieve him from the duty of looking and listening for trains. *Illinois Cent. R. Co. v. Sumrall* (Miss.), 585.

Failure to give statutory train signals does not excuse highway traveler from exercise of ordinary care for his own safety. *Sprague v. Northern Pac. Ry. Co.* (Mont.), 578.

Highway traveler is not necessarily negligent because the danger from the train by which he was struck might have been seen and avoided. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

In using temporary and defective crossing as driveway at invitation of foreman of track repairers, plaintiff acted upon his own judgment, with full knowledge of conditions; and there was no actionable negligence on part of railroad. *McClelland v. Missouri Pac. Ry. Co.* (Kan.), 589.

Inference of negligence on part of highway traveler does not arise from mere fact that he attempted to use it at a time a train ran into him. *Sprague v. Northern Pac. Ry. Co.* (Mont.), 578.

Instruction that, if traveler could have avoided the accident by stopping his team before he reached a place of peril, and failed to do so, he was negligent, was erroneous. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

Of person trying to stop horse approaching crossing without a driver, and jerked on track by train. *Campbell v. Chicago, etc., Ry. Co.* (Minn.), 98.

Plaintiff is not required to negative all negligence by him in order to recover for injuries sustained at railroad crossing. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

CROSSINGS—Continued.

Question for jury. *Bruggeman v. Illinois Cent. R. Co. (Iowa)*, 241.

Right to rely on conduct of flagman and attempt to pass over crossing. *Wiggin v. Boston & M. R. R. (N. H.)*, 577.

Struck by train which highway traveler saw approaching before he attempted to cross track. *Bruggeman v. Illinois Cent. R. Co. (Iowa)*, 241.

The fact that when one driving a vehicle reached a point ten feet from the track he could see the train by which he was injured approaching, does not show that such point was, as matter of law, a place of safety, but the question is for jury. *Sprague v. Northern Pac. Ry. Co. (Mont.)*, 578.

Traveler is not bound to anticipate negligence on part of trainmen. *Campbell v. Chicago, etc., Ry. Co. (Minn.)*, 98.

Traveler struck by train he should have seen in time. *Illinois Cent. R. Co. v. Sumrall (Miss.)*, 585.

Where pedestrian, crossing four railroad tracks at grade, with clear view of tracks for 2,148 feet in direction in which train came, and was struck by the train, he will be conclusively presumed to have been guilty of contributory negligence. *Evans v. Pennsylvania Co. (Pa.)*, 584.

Whether driver approaching railroad crossing exercised ordinary care in selecting point to stop and listen for approaching trains, and whether in doing what he did, from that point until a collision with a train at the crossing, amounted to the exercise of ordinary care, were questions for jury. *Sprague v. Northern Pac. Ry. Co. (Mont.)*, 578.

Contributory Negligence and Negligence.

Liability where injured party was negligent but train was run at high speed, without signals, over unguarded public street crossing at much frequented place. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Negligence of railroad in not giving statutory warnings, or in not lowering gates at a crossing, does not absolve a person from the exercise of that due care which is required from one going into place of danger. *Lindsay v. Pennsylvania R. Co. (N. J.)*, 755.

Degree of Care.

Railroad must use reasonable care to avoid injuring people at street crossings. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Discovered Peril.

Contributory negligence, and negligence on part of railroad after discovering traveler's peril, application of doctrine of where were both. *St. Louis, etc., R. Co. v. Summers (C. C. A.)*, 117.

Right of trainmen to presume that traveler will stop his team before reaching crossing. *St. Louis, etc., R. Co. v. Summers (C. C. A.)*, 117.

Evidence.

As to whether one standing where intestate was when struck by engine could distinguish defendant's tracks from those of another company running parallel thereto, where it was not shown that deceased was so deceived. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

In action for death by being struck by engine at street crossing, plaintiff could show the extent and frequency of travel at the crossing at time of the injury. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

CROSSINGS—Continued.

Regulation or custom as to where street cars should stop at crossing in question was admissible as bearing on decedent's negligence, evidence of. *West v. Detroit United Ry.* (Mich.), 102.

Evidence did not warrant a recovery against railroad for death of highway traveler, on the ground that the accident was avoidable by the exercise of ordinary care by the trainmen notwithstanding the fact that deceased was guilty of contributory negligence. *Illinois Cent. R. Co. v. Nelson* (C. C. A.), 257.

Flagmen.

Duty of flagman to give such reasonable warning as will enable traveler to stop his team at point where ordinarily well-broken and gentle horse would not become dangerously frightened. *Huntington v. Bangor & A. R. Co.* (Me.), 111.

Flagman is not negligent in leaving his post after train has reached crossing. *Huntington v. Bangor & A. R. Co.* (Me.), 111.

Not negligence to maintain flagman at crossing, instead of gates attended by watchman, when is it. *Huntington v. Bangor & A. R. Co.* (Me.), 111.

Gates.

Duty of railroad to employ such means as are reasonably necessary, considering its character, to warn travelers where the crossing is specially dangerous. *Huntington v. Bangor & A. R. Co.* (Me.), 111.

Gates need not be maintained as barrier to runaway teams. *Huntington v. Bangor & A. R. Co.* (Me.), 111.

Last Clear Chance.

It is not essential, as a rule, that plaintiff's negligence should have ceased before the accident, in order to recover under last chance doctrine. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

Statement of doctrine of as applicable to railroad crossing accidents. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

Lookouts.

Private crossing, engineer is not bound to look away from track to see if can discover top of vehicle above sides of cut through which road runs, but, is bound to watch track before him, when train is approaching. *Louisville & N. R. Co. v. Engleman's Adm'r* (Ky.), 106.

Trainmen were under no duty, arising out of proximity of an abandoned road crossing the track, to keep lookout for one on track. *Southern Ry. Co. v. Stewart* (Ala.), 234.

Mutual Rights and Duties.

Railroad has right of way at street crossings. *Weatherly v. Nashville, etc., Ry.* (Ala.), 759.

Reciprocal duties of highway traveler and railroad company. *Illinois Cent. R. Co. v. Sumrall* (Miss.), 585.

Right of railroad and another user of streets to rely upon the exercise of due care by the other to avoid injury. *Weatherly v. Nashville, etc., Ry.* (Ala.), 759.

Negligence.

Certain statute does not make a railroad liable for injuries at crossings irrespective of negligence which contributed to the accident. *Weatherly v. Nashville, etc., Ry.* (Ala.), 759.

Failure to comply with duties required of a railroad at public crossing by statute or ordinance may be so gross, reckless,

CROSSINGS—Continued.

- and wanton as to amount to wanton negligence. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.
- Imposition by statute or ordinance of certain duties upon railroad companies at public crossings does not exempt them from all other duties which are reasonably necessary to avoid injury at the crossing. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.
- Question for jury whether railroad company was guilty of wanton negligence in running train over interstate. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.
- Question for jury whether railroad's wanton negligence in running engine at crossing proximately caused interstate's death. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.
- Violation by railroad of duties imposed upon it by statute or ordinance as to running over public crossings constitutes at least simple negligence. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Presumption of Negligence.

- Mere injury of person or property at public crossing by a railroad does not of itself make the company liable therefor. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Signals.

- Comparative weight of positive and negative testimony as to whether signals were given. *Anspach v. Philadelphia & R. Ry. Co. (Pa.)*, 91.
- Failure to give statutory train signals is actionable negligence. *Sprague v. Northern Pac. Ry. Co. (Mont.)*, 578.
- Iowa Code, § 2072, requiring the whistle to be sounded and the bell rung at crossings, but excusing the sounding of the whistle at street crossings within the limits of cities or towns, does not remove the necessity of the giving of both of such signals at a crossing in a village. *Bruggeman v. Illinois Cent. R. Co. (Iowa)*, 241.
- Private crossing could rely on them being given, question for jury whether custom of giving signals was such that persons using. *Louisville & N. R. Co. v. Engleman's Adm'r (Ky.)*, 106.
- Private crossings, duty to give train signals when approaching. *Louisville & N. R. Co. v. Engleman's Adm'r (Ky.)*, 106.
- Where evidence shows that an engine was running at about 20 miles an hour, that it ran 300 or 400 feet after it hit horse, and there was evidence that no signal was given, negligence was question for jury. *Gibson v. Bessemer & L. E. R. Co. (Pa.)*, 87.

Speed.

- Negligence for railroad to operate train at rate of speed forbidden by law. *Illinois Cent. R. Co. v. Sumrall (Miss.)*, 585.
- Negligence in running train at excessive speed over country crossing in nighttime. *Anspach v. Philadelphia & R. Ry. Co. (Pa.)*, 91.
- Private crossings, trains may be run at any rate of speed over. *Louisville & N. R. Co. v. Engleman's Adm'r (Ky.)*, 106.
- Running train 30 miles an hour over street crossing, and in violation of ordinance, is ordinary negligence. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Stop, Look and Listen.

- Duty to look and listen for street car was satisfied when traveler saw the car stop at station 230 feet away, and circumstances indicated that it would travel in opposite direction. *Wilson v. Seattle, etc., Co. (Wash.)*, 80.

CROSSINGS—Continued.

Failing to look or listen is question of law and when question of fact, when contributory negligence in. *Schanno v. St. Paul City Ry. Co.* (Minn.), 94.

Failure to look before driving upon tracks of street railway is negligence per se. *Sontum v. Mahoning & S. Ry. & L. Co.* (Pa.), 574.

Highway traveler was bound to look for trains from a point where it would be effective, just before going upon the track, and his neglect to do so contributed to the accident. *Lindsay v. Pennsylvania R. Co.* (N. J.), 755.

Ignorance of country and existence of crossing no excuse for failure to stop, look, and listen before going on track. *Anspach v. Philadelphia & R. Ry. Co.* (Pa.), 91.

Instruction was erroneous as requiring plaintiff to exercise the highest degree of care by selecting the "best" places for looking, instead of ordinary care. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

Pedestrian's duty when about to cross tracks at street crossing. *Weatherly v. Nashville, etc., Ry.* (Ala.), 759.

Person approaching crossing cannot rely on the giving of the statutory train signals. *Sprague v. Northern Pac. Ry. Co.* (Mont.), 578.

Select position from which effective observation can be made, duty of highway traveler to. *Sprague v. Northern Pac. Ry. Co.* (Mont.), 578.

There is no hard and fast requirement that highway traveler must stop, look, and listen, and to continue to look, under all circumstances. *Campbell v. Chicago, etc., Ry. Co.* (Minn.), 98.

DAMAGES.

See CARRIERS; CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; PERSONAL INJURIES.

Mental Suffering.

Right to recover for. *Caldwell v. Northern Pac. Ry. Co.* (Wash.), 161.

Pleading.

Allegation of special damages in blank sum amounts to no allegation of such damages. *Lexington Ry. Co. v. Johnson* (Ky.), 181.

Special damages must be specifically alleged. *Lexington Ry. Co. v. Johnson* (Ky.), 181.

Punitive Damages.

Exemplary damages are not allowable, unless authorized by statute. *Caldwell v. Northern Pac. Ry. Co.* (Wash.), 161.

Gross negligence. *Louisville & N. R. Co. v. Smith* (Ky.), 457.

Laws of state wherein personal injury occurred govern question whether punitive damages should be awarded. *Louisville & N. R. Co. v. Smith* (Ky.), 457.

May be recovered, though no actual damages are sustained. *Vlasservitch v. Augusta & A. Ry. Co.* (S. Car.), 721.

Punitive damages may be affirmatively withheld by Legislature so far as impinging rights of property is concerned. *Louisville & N. R. Co. v. Street* (Ala.), 213.

Trainmen's reckless disregard of human life at crossing. *Louisville & N. R. Co. v. Smith* (Ky.), 457.

DEATH BY WRONGFUL ACT.

Common law gave administrator no right of action for intestate's death. *Pinson v. Southern Ry.* (S. Car.), 700.

DEATH BY WRONGFUL ACT—Continued.**Contributory Negligence.**

Presumption of the exercise of due care for his own safety by deceased. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Presumption that deceased used proper care to discover approaching trains before going upon railroad tracks. *Sontum v. Mahoning & S. Ry. & L. Co. (Pa.)*, 574.

Presumption that person killed at private railroad crossing was guilty of contributory negligence, there is no. *Louisville & N. R. Co. v. Engleman's Adm'r (Ky.)*, 106.

Under certain statute contributory negligence by intestate which would have barred an action by him had death not resulted will bar an action for his death by his personal representative. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Damages.

Ala. Code 1907, § 2486, provides for recovery of punitive damages only. *Louisville & N. R. Co. v. Street (Ala.)*, 213.

Exposure of decedent's dead body, right to recover for under certain statute. *Pinson v. Southern Ry. (S. Car.)*, 700.

\$8,250 was excessive verdict for death of city fireman 46 years old, and was reduced to \$6,000. *Engvall v. Des Moines City Ry. Co. (Iowa)*, 266.

"Instantaneous," within certain statute, whether decedent's death was. *West v. Detroit United Ry. (Mich.)*, 102.

Right of Action.

Certain statute creates two causes of action,—one for benefit of the estate to recover damages which decedent could have recovered had he survived the accident, and the other for benefit of widow and next of kin for damages sustained by the death. *St. Louis, etc., Ry. Co. v. Corman (Ark.)*, 48.

Who may sue. *St. Louis, etc., Ry. Co. v. Corman (Ark.)*, 48.

Rights of parties in action for death must be determined in accordance with law of state where injury occurred. *St. Louis, etc., Ry. Co. v. Corman (Ark.)*, 48.

Transitory, action by decedent's widow and next of kin for death is. *St. Louis, etc., Ry. Co. v. Corman (Ark.)*, 48.

DEMURRAGE.

See INTERSTATE COMMERCE.

DOGS.

See ANIMALS.

DRUNKENNESS.

See CARRIERS OF PASSENGERS.

EMINENT DOMAIN.**Damages.**

Fact that land taken for railroad right of way will remain unfenced for six months. *Herrin & S. R. Co. v. Nolte (Ill.)*, 220.

Necessity for Exercise.

Objection that another property should be taken furnishes no test for the necessity for expropriation in ordinary cases. *Louisiana & A. Ry. Co. v. Louisiana Ry. & N. Co. (La.)*, 548.

Property Subject.

Spur track, not devoted to public use, is subject to expropriation by another corporation. *Louisiana & A. Ry. Co. v. Louisiana Ry. & N. Co. (La.)*, 548.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS.

Brakeman signaling to engineer of freight train was not in "physical control or direction of the movement of a signal" within N. Y. Laws 1906, c. 657, § 42a, so as to render him a vice principal of the railroad. *Hallock v. New York, etc., Ry. Co.* (N. Y.), 332. Constitutionality of Laws Neb. 1907, p. 192, c. 48, § 2, providing for application of the rule of comparative negligence in actions by employees against railroad companies for personal injuries, and also that all questions of negligence and contributory negligence shall be for jury. *Missouri Pac. Ry. Co. v. Castle* (C. C. A.), 436.

Contributory Negligence.

Effect of contributory negligence of employee on right to recover under employers' liability act. *Ryland v. Atlantic Coast Line R. Co.* (Fla.), 56.

Where railroad or its employees superior to the injured fireman knew of the defect in question, it was unnecessary, under Ala. Code 1896, § 1749, for the fireman to give notice of the defect. *St. Louis, etc., R. Co. v. Phillips* (Ala.), 792.

Laws Neb. 1907, p. 191, c. 48, § 1, providing that railroad companies operating trains within state shall be liable for injuries to employees resulting from negligence of other employees, applies to railroads doing an interstate business, and governs the liability of such companies to employees operating trains engaged in interstate commerce in absence of valid legislation by Congress covering such liability. *Missouri Pac. Ry. Co. v. Castle* (C. C. A.), 436.

Pleading.

Sufficiency of complaint, in action under Ala. Code 1896, § 1749. *St. Louis, etc., R. Co. v. Phillips* (Ala.), 792.

Railroad Work.

Work of yard or shop employee, who is injured by the negligent operation of a locomotive under steam and upon the tracks in a roundhouse, is within the hazards peculiar to the operation of railroads. *Hoveland v. Chicago, etc., Ry. Co.* (Minn.), 786.

EVIDENCE.

See FIRES SET BY LOCOMOTIVES; CARRIERS; CROSSINGS; MASTER AND SERVANT; NEGLIGENCE.

Admissions against interest of injured person. *St. Louis, etc., Ry. Co. v. Dallas* (Ark.), 167.

Books on air brakes, which purported to give the distances in which trains moving at different rates of speed could be stopped by the application of air, were not admissible in evidence to show such facts. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

Engineer's opinion as to whether he could by any possibility have stopped train in a shorter distance than it was stopped was objectionable as calling for a conclusion. *Bruggeman v. Illinois Cent. R. Co.* (Iowa), 241.

Opinion Evidence.

That it was negligent operation to run engine into railroad yard without giving adequate warning of the engine's approach. *Russell's Adm'r v. Louisville & N. R. Co.* (Ky.), 753.

Res Gestæ.

Declarations, when admissible as. *Meyers v. San Pedro, etc., R. Co.* (Utah), 21.

EXPRESS COMPANIES.

See CARRIERS OF PASSENGERS.

Limiting Liability.

Under Gen. St. Kan. 1101, §§ 5857, 5858, contract between express company and its messenger stipulating that the messenger shall exempt express company from liability for its own negligence, and undertaking to afford similar immunity to railroad companies in whose cars he might travel in performance of his duties, and a contract between the express company and a railroad company by which it was sought to give the latter the benefit of the first mentioned contract, were void. *Weir v. Rountree* (C. C. A.), 144.

FEDERAL JURISDICTION.**Removal of Cause.**

Allegations in removal petition were not sufficient to entitle petitioner to removal of cause to federal court, where, in Kentucky, where action was commenced against nonresident lessee railway company exclusively operating the road, to recover for the death of an engineer, the facts alleged and proved against the lessee railroad company in the state court made its lessor jointly liable as matter of law. *Illinois Cent. R. Co. v. Sheegog* (U. S.), 17.

FELLOW SERVANTS.**Concurring Negligence.**

Brakeman injured because of failure of master to provide dealer was entitled to recover, through negligence of his fellow servant concurred with that of master. *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 48.

Master is not liable for injuries caused by transitory act of co-servant in using safe appliances negligently. *Wickham v. Detroit United Ry.* (Mich.), 321.

Railroad was not liable for injury to its street car conductor, sustained while on running board by his foot coming in contact with loaded wheelbarrow negligently left too near track by one of company's section men for such a short time that it was not chargeable with notice of the obstruction. *Wickham v. Detroit United Ry.* (Mich.), 321.

Superior Servant Limitation.

"Direction or control" referred to in certain statute defining "vice principals" means that which proceeds from superior authority. *Hallock v. New York, etc., Ry. Co.* (N. Y.), 332.

The jury, in action for injury to brakeman through failure to stop the engine as signaled by the brakeman, should be instructed that, that though he gave a stop signal to the fireman, if the latter did not pass it to the engineer the company was not liable. *Louisville & N. R. Co. v. Percy* (Ky.), 326.

Who Are.

Conductor of train told decedent, servant of oil company, to remove certain skids, if this was recognized and obeyed as a command, they became fellow servants, where. *Welch v. Boston & M. R. R.* (Mass.), 35.

Conductor of train told decedent, servant of oil company, to remove certain skids, which he proceeded to do, it was question for jury whether they became temporarily fellow servants, where. *Welch v. Boston & M. R. R.* (Mass.), 35.

FELLOW SERVANTS—Continued.

Crews of different sections of train. *Meyers v. San Pedro, etc., R. Co. (Utah)*, 21.

Engineer is not superior to fireman in matter of keeping a proper roadbed. *St. Louis, etc., R. Co. v. Phillips (Ala.)*, 792.

Fireman and brakeman of same train. *Louisville & N. R. Co. v. Percy (Ky.)*, 326.

Mere fact that station agent, employed jointly by two railroad companies, employed a towerman did not prevent latter from being a servant of the railroads and a fellow servant of an engineer of one of the railroads. *Stever v. Ann Arbor R. Co. (Mich.)*, 337.

Station agent and freight brakeman on train switching at station are fellow servants. *Hallock v. New York, etc., Ry. Co. (N. Y.)*, 332.

Towerman, in charge of the semaphore and interlocker at the crossing of two railroads, each company paying half of his compensation, is a fellow servant of an engineer of one of the railroads. *Stever v. Ann Arbor R. Co. (Mich.)*, 337.

FENCES.

See EMINENT DOMAIN.

FIRES SET BY LOCOMOTIVES.**Evidence.**

That, shortly before and after the fire, other engines, equipped with spark arresters of same pattern, emitted large sparks frequently set fires. *Cincinnati, etc., Ry. Co. v. Sadieville Milling Co. (Ky.)*, 553.

Was error to admit evidence that on several occasions defendant's trains had stopped at point in question and cleared the fire boxes of the engines, and that cinders rolled down the fill towards plaintiff's barn. *Cincinnati, etc., Ry. Co. v. Sadieville Milling Co. (Ky.)*, 553.

Indemnity.

Person granted permission to erect warehouse on railroad's right of way could not escape liability to the railroad for the sum it was obliged to pay to owners of property stored, on the warehouse being burned by the negligence of the railroad, on a showing that the fire was caused by the reckless or willful misconduct of the railroad's employees, though the reckless and willful misconduct of the railroad itself would be a good defense. *Charleston & W. C. Ry. Co. v. Devlin (S. Car.)*, 341.

Limiting Liability.

Contract for construction of spur track, exempting railroad from liability for loss of cotton gin plant or damage thereto by fire from a locomotive, was valid, though the gin was beyond limits of railroad right of way. *Mayfield v. Southern Ry. Co. (S. Car.)*, 299.

Exemption, in contract for construction of spur track to cotton gin, embraced fires communicated from railroad's main line. *Mayfield v. Southern Ry. Co. (S. Car.)*, 299.

Origin of Fire.

Insufficiency of evidence as to cause of fire in question required peremptory instruction for defendant railroad. *Cincinnati etc., Ry. Co. v. Sadieville Milling Co. (Ky.)*, 553.

Presumption of Negligence.

Mere fact that engines passing shortly before and after the fire

FIRES SET BY LOCOMOTIVES—Continued.

in question emitted sparks. *Cincinnati, etc., Ry. Co. v. Sadieville Milling Co. (Ky.)*, 553.

Spark Arresters.

Most effective spark arresters in general use, and using due care in management of engines, effect of equipping locomotives with. *Cincinnati, etc., Ry. Co. v. Sadieville Milling Co. (Ky.)*, 553.

FOREIGN CORPORATIONS.

See **PROCESS; TAXATION.**

FRIGHTENING TEAMS.

See **CROSSINGS.**

Complaint charged motorman with ordinary negligence, and not with gross negligence; it being necessary to gross negligence that act or omission causing the injury must have been wanton or wilful. *Gould v. Merrill, etc., Co. (Wis.)*, 273.

Evidence raised issue of wanton misconduct on part of defendant's mortorman. *North Alabama Traction Co. v. Thomas (Ala.)*, 293.

Lookouts.

Duty of mortorman of street car. *Gould v. Merrill, etc., Co. (Wis.)*, 273.

Noises.

Ordinary and proper sounds made by moving street car, and its gong. *Gould v. Merrill, etc., Co. (Wis.)*, 273.

Precautions required of motorman, upon discovering that a team near track is frightened by the ordinary sounds caused by the approach of his car and the ringing of its bell. *Gould v. Merrill, etc., Co. (Wis.)*, 273.

Precautions to be taken by motorman on discovering that horse is becoming unmanageable because of his fear of car. *North Alabama Traction Co. v. Thomas (Ala.)*, 293.

Where woman was injured while driving, by reason of her horse starting suddenly and dashing against train passing crossing, railroad was not liable. *Huntington v. Bangor & A. R. Co. (Me.)*, 111.

Whether the conditions were such as to indicate that plaintiff's horse was frightened and unmanageable when the motorman saw him was for jury. *North Alabama Traction Co. v. Thomas (Ala.)*, 293.

GROSS NEGLIGENCE.

See **CARRIERS OF PASSENGERS; FRIGHTENING TEAMS; NEGLIGENCE.**

IMPUTED NEGLIGENCE.

Driver's negligence could not be imputed to his guest riding with him in buggy. *North Alabama Traction Co. v. Thomas (Ala.)*, 293.

Horse killed at grade crossing by joint negligence of person by whom it was hired and railroad, negligence of former is not imputable to owner of livery stable, where. *Gibson v. Bessemer & L. E. R. Co. (Pa.)*, 87.

Negligence of driver of automobile is not imputable to occupant who is riding as guest of another and has no control over movements of car. *Dale v. Denver City Tramway Co. (C. A.)*, 83.

Where plaintiff was riding on express wagon by driver's invita-

IMPUTED NEGLIGENCE—Continued.

tion or consent, latter's negligence in operating wagon could not be imputed to plaintiff. *Ingalls v. Lexington, etc., Ry. Co. (Mass.)*, 297.

INDEPENDENT CONTRACTORS.

Liability of employer for negligence of independent contractor. *Southern Ry. Co. v. Lewis (Ala.)*, 743.

INTERSTATE COMMERCE.

See **CONNECTING CARRIERS; CONSTITUTIONAL LAW; EMPLOYER'S LIABILITY ACTS; TAXATION.**

Demurrage.

State Railroad Commission may fix reciprocal demurrage rules, making carrier liable for delays in delivery of interstate shipments after arrival at the point of consignment. *Yazoo & M. V. R. Co. v. Greenwood Grocery Co. (Miss.)*, 417.

State Interference.

Penalizing failure of common carrier to adjust and pay within specified time claims for loss or damage, as is done by South Carolina act of Feb. 23, 1903, §. 2. *Atlantic C. L. R. Co. v. Mazursky (U. S.)*, 591.

Validity of order of state railroad commission directing interstate railway to discharge its corporate duty by affording passenger train service between the terminus of a branch line within the state and the point of intersection with the state line. *Missouri Pac. Ry. Co. v. Kansas (U. S.)*, 728.

Validity of statute penalizing failure of common carrier to adjust and pay within specified time claims for loss or damage. *Atlantic C. L. Ry. Co. v. Mazursky (U. S.)*, 591.

LEASES AND RUNNING POWERS.

See **STREET RAILWAYS.**

Injury to passenger received in collision between his carrier's street car and car of company it admits to joint use of its track, though the collision resulted wholly from negligence of latter company, carrier is liable for. *Maumee Valley, etc., Co. v. Montgomery (Ohio)*, 724.

LICENSEES.

See **ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; STATIONS AND DEPOTS; TRESPASSERS.**

Conductor's invitation one goes on car, and is injured by negligence of railroad's employers, it is liable, if in response to. *Welch v. Boston & M. R. R. (Mass.)*, 35.

Contributory Negligence.

Drayman at depot standing on sidetrack so close to railroad track that he was struck by portion of engine. *Southern Ry. Co. v. Bailey (Va.)*, 557.

Person on standing car for purpose of performing a service at conductor's request, and injured by reason of the sudden starting of the car on conductor's order. *Welch v. Boston & M. R. R. (Mass.)*, 35.

Degree of Care.

Accompanying passengers to stations, degree of care due from carrier to persons. *Louisville & N. R. Co. v. Smith (Ky.)*, 457.
Care due trespasser or bare licensee on train. *Welch v. Boston & M. R. R. (Mass.)*, 35.

LICENSEES—Continued.

Required of those controlling train approaching depot or other point at which it is reasonable to expect that persons will be in danger from the train. *Southern Ry. Co. v. Bailey (Va.)*, 557.

Trainman must exercise ordinary care to avoid injuring bare licensee using roadbed as footpath. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r (Va.)*, 229.

Discovered Peril.

Application of doctrine of discovered peril where trainmen should have discovered peril of licensees, using roadbed as footpath, in time to avoid injuring him. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r (Va.)*, 229.

Evidenced justified finding of negligent failure of trainmen to exercise ordinary care to avoid injuring bare licensee, using roadbed as footpath, authorizing recovery notwithstanding his contributory negligence. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r (Va.)*, 229.

Lookouts.

Trainmen's duty to bare licensee using roadbed at footpath. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r (Va.)*, 229.

Precautions which must be used by trainmen in order to avoid injuring persons using railroad embankment as footpath. *Chesapeake & O. Ry. Co. v. Ball (Ky.)*, 238.

Who Are.

Employee of person owning the track invited by railroad company's conductor to go on train. *Welch v. Boston & M. R. R. (Mass.)*, 35.

Implied license to use railroad embankment as footpath, what constituted. *Chesapeake & O. Ry. Co. v. Ball (Ky.)*, 238.

License to use railroad roadbed as footpath was acquired by customary use by tacit consent of company. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r (Va.)*, 229.

Mere fact that railroad track is frequently used by pedestrians does not, standing alone, show that the railroad company is informed of that use. *Southern Ry. Co. v. Stewart (Ala.)*, 234.

Person going to train to meet passenger need not wait until train arrives before going to platform, in order to avail himself of rule of law that requires carrier to exercise ordinary care for his safety. *Louisville & N. R. Co. v. Smith (Ky.)*, 457.

Person passing along way leading from street over railroad station grounds to station platform for purpose of mailing letter on train. *Atchison, etc., Ry. Co. v. Jandera (Okl.)*, 154.

Persons mailing letters on trains, duty of railroad to keep way over its station grounds in safe condition for use of. *Atchison, etc., Ry. Co. v. Jandera (Okl.)*, 154.

MAIL.

See CARRIERS OF MAIL.

MAIL CLERKS.

See CARRIERS OF MAIL; CARRIERS OF PASSENGERS.

MALICIOUS PROSECUTION.

Whether there was probable cause for prosecution of conductor, where there was evidence that five men of good character watched the conductor at various times, and reported that he failed to ring numerous fares, and the company did not bring the prosecution until advised to do so by counsel, was question of law for the court. *Roessing v. Pittsburg Rys. Co. (Pa.)*, 571.

MASTER AND SERVANT.

See CHILDREN; EMPLOYERS' LIABILITY ACTS; EVIDENCE; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; RAILROADS; RAILROADS IN STREETS.

Appliances.

Evidence warranted finding of master's negligence in failing to install derailing or other device to prevent escape of ballast cars from storage track in action for death of brakeman in collision. *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 48.

Master is not required to furnish the servant with the newest and best appliances, and he performs duty when he furnishes those of ordinary character and reasonable safety. *Southern Ry. Co. v. Lewis* (Va.), 778.

Assumption of Risk.

Burden of plaintiff to show that deceased foreman of switching crew did not have knowledge that his engine headlight was defective may be sustained by circumstantial evidence. *Ross v. Chicago, etc., Ry. Co.* (Ill.), 41.

Burden was on plaintiff administratrix to show that deceased foreman of switching crew did not have knowledge that his engine's headlight was defective. *Ross v. Chicago, etc., Ry. Co.* (Ill.), 41.

Continuing in the service with knowledge of dangerous defects, without objection. *St. Louis, etc., R. Co. v. Phillips* (Ala.), 792.

Dangers incident to work are assumed by servant, risks from. *Ross v. Chicago, etc., Ry. Co.* (Ill.), 41.

Derailing device where storage track connected with main track, effect of brakeman's knowledge of absence of. *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 48.

Failure of master to comply with statutory requirements enacted for protection of employees. *St. Louis, etc., R. Co. v. White* (Ark.), 319.

Fireman does not assume risk of negligence of his fellow servant in handling locomotive on which he is riding. *St. Louis, etc., R. Co. v. Phillips* (Ala.), 792.

Fireman injured by breaking of lubricator feed glass of engine. *St. Louis, etc., Ry. Co. v. Wells*, (Ark.), 638.

Foreman of switching crew, continuing to work with knowledge that engine used lacked proper head-light, and injured in collision between switch engines. *Ross v. Chicago, etc., Ry. Co.* (Ill.), 41.

Lifting heavy weights under orders. *Stenvog v. Minnesota Transfer Co.* (Minn.), 39.

Negligence of employer. *St. Louis, etc., Ry. Co. v. Corman* (Ark.), 49.

Negligence of master may be assumed, risks from. *St. Louis, etc., Ry. Co. v. Hawkins* (Ark.), 46.

Question for jury, whether. *St. Louis, etc., Ry. Co. v. Hawkins* (Ark.), 46.

Right to continue in the service relying on master's promise to remedy defects. *St. Louis, etc., R. Co. v. Phillips* (Ala.), 792.

Sufficiency of evidence of foreman of switching crew's knowledge that his engine's headlight was defective to warrant direction of verdict for defendant railroad, in action for his death, caused by collision between switch engines. *Ross v. Chicago, etc., Ry. Co.* (Ill.), 41.

Where cinder shoveler, returning to work in cinder pit after he had complained of a hostler taking engines into the pit without

MASTER AND SERVANT—Continued.

signals, and had threatened to quit unless required signals were given, and was informed that his complaint had been properly lodged. *St. Louis, etc., Ry. Co. v. Hawkins (Ark.)*, 46.

Cars.

Degree of care required of railroad in inspecting its cars to ascertain presence of defects dangerous to its employees. *Erie R. Co. v. Schomer (C. C. A.)*, 303.

Question for jury whether inspection of coal car had been ordinarily careful. *Erie R. Co. v. Schomer (C. C. A.)*, 303.

Contributory Negligence.

Care required to be exercised by employee for his own safety; and effect of failure to exercise such care. *Ryland v. Atlantic Coast Line R. Co. (Fla.)*, 56.

Duty of servant injured to have remedied the defect by reason of which he was injured. *St. Louis, etc., R. Co. v. Phillips (Ala.)*, 792.

Employee was not guilty of contributory negligence in not adopting another and safer method of performing the task assigned to him. *Fliege v. Kansas City, etc., Ry. Co. (Kan.)*, 789.

Fireman knowing of defect in roadbed, is not guilty of contributory negligence for failure to inform the engineer of it. *St. Louis, etc., R. Co. v. Phillips (Ala.)*, 792.

Freight yard employee attempting to cross string of cars which he knew, or should have known, was liable to be moved at any time. *Ryan v. Northern Pac. Ry. Co. (Wash.)*, 71.

Injured fireman's failure to perform his duty to keep lookout for obstructions near track. *St. Louis, etc., R. Co. v. Phillips (Ala.)*, 792.

Instead of instruction given, there should have been given one to the effect that the injured employee was bound to exercise such care to keep out of danger as may be reasonably expected of a person of ordinary prudence situated as he was, and if he failed to do so, and but for such failure he would not have been injured, he could not recover, notwithstanding any negligence of the superior servant. *Louisville & N. R. Co. v. Percy (Ky.)*, 327.

Negligent failure of employee to exercise his authority over another employee to prevent injury to himself caused by negligence of such other employee. *Ryland v. Atlantic Coast Line R. Co. (Fla.)*, 56.

Of car carpenter killed by reason of failure to put out flags on cars being repaired, in violation of rule requiring inspectors and carpenters working on cars to protect their own safety, rendered it immaterial that the car inspector, his superior, was working with him at the time and was chargeable with the same negligence. *Russell's Adm'r v. Louisville & N. R. Co. (Ky.)*, 753.

Of switchman in attempting to mount footboard in approaching switch engine while standing between rails of train barred recovery for his injuries although the footboard and the handhold on the engine was defective, and it was his right as switchman to ride on foot-board. *Pratt v. Southern Ry. Co. (Ala.)*, 751.

Plea must show causal connection between injured servant's alleged contributory negligence and his injury. *St. Louis, etc., R. Co. v. Phillips (Ala.)*, 792.

Question for jury whether brakeman was negligent in going on track, and working on lever of car to which coupling was to be made, without waiting to see whether stop signal he gave the engineer was obeyed. *Louisville & N. R. Co. v. Percy (Ky.)*, 326.

MASTER AND SERVANT—Continued.

Right to rely on orders and advice of master. *Stenvog v. Minnesota Transfer Co.* (Minn.), 39.

Servant's conduct as affected by fact that situation called for immediate action. *Erie R. Co. v. Schomer* (C. C. A.), 303.

Station agent, in loitering for two or three minutes on the track without looking to see the movements of the trains thereon upon the arrival of a passenger train, was negligent, though a rule of the railroad that trains approaching a station where another train is receiving and discharging passengers shall not pass such train on either side until it has proceeded beyond the station. *Hallock v. New York, etc., Ry. Co.* (N. Y.), 332.

Switchman's mistake in throwing wrong switch was the remote cause of his injury, and hence such mistake did not deprive him of the right to have his act in crossing car considered on question of contributory negligence, with reference to the emergency then existing for immediate action. *Erie R. Co. v. Schomer* (C. C. A.), 303.

Switchman's negligence in attempting to cross front end of coal car, on which there was no platform or end sill, instead of adopting some other method, was for jury. *Erie R. Co. v. Schomer* (C. C. A.), 303.

Coupling Cars.

Brakeman, injured while preparing to make a coupling, through a stop signal given the engineer being neglected, may show that railroad had piled timber along the track, and consequent obstruction of view between him and the engineer, only as the reason for his communicating the stop signal to the engineer through the fireman, instead of directly to him, on the occasion in question. *Louisville & N. R. Co. v. Percy* (Ky.), 326.

Railroad, as an employer, has a right, when backing an engine to make a coupling, to do so with car attached to engine. *Louisville & N. R. Co. v. Percy* (Ky.), 326.

Degree of Care.

Master is only bound to use reasonable care to furnish safe appliances. *Siegel v. Detroit, etc., Ry. Co.* (Mich.), 311.

Masters are liable for the consequences, not of danger, but of negligence, and they are not insurers. *Southern Ry. Co. v. Lewis* (Va.), 743.

Railroads should not be required to compensate injuries to their employees for which in law they are not responsible. *Ryland v. Atlantic Coast Line R. Co.* (Fla.), 56.

Discovered Peril.

Though station agent when struck by a switching freight train was in a place of danger through his own negligence, it would not excuse the negligence of the train crew in running him down after his dangerous position was apparent. *Hallock v. New York, etc., Ry. Co.* (N. Y.), 332.

Evidence.

Evidence as to subsequent condition of track, in action for death of engineer. *Missouri, etc., Ry. Co. v. Williams* (Tex.), 770.

Res gestæ, statement by division superintendent to discharged conductor, contained in service letter, was not admissible as. *Meyers v. San Pedro, etc., R. Co.* (Utah), 21.

Rule that trains will approach yard limits under full control and be prepared to stop within the limits of vision, etc., was admissible in action for death of conductor killed in rear end collision between sections of train. *Meyers v. San Pedro, etc., R. Co.* (Utah), 21.

MASTER AND SERVANT—Continued.

Testimony of conductor of section of train which collided with other section, as to when his train was due at a station, was admissible as against objection that time-table was best evidence. *Meyers v. San Pedro, etc., R. Co. (Utah)*, 21.

Inspection of Appliances.

Hidden defects in cars cause injury to its employees, liability of railroad where. *Ryland v. Atlantic Coast Line R. Co. (Fla.)*, 56. Railroad was not negligent in failing to inspect torpedoes before fastening them to the rails; the mere possibility that one torpedo out of thousands might be defective and fail to explode, and thereby indirectly cause a collision in which a brakeman would be injured, not being sufficient to show negligence in that respect. *Siegel v. Detroit, etc., Ry. Co. (Mich.)*, 311.

Joint Liability.

Manufacturing company and railroad company were engaged in a joint operation on the occasion in question, and there was imposed on them the joint duty to use due care towards those employed in the work, and, as an employee was injured though the negligent performance of that duty, the companies were guilty of a joint tort upon which arose a joint and several liability to the injured employee. *Fliege v. Kansas City W. Ry. Co. (Kan.)*, 789.

Lookouts.

Certain statutory requirements that railroads keep a constant lookout for objects on track is for benefit of their employees as well as others. *St. Louis, etc., R. Co. v. White (Ark.)*, 319. Negligence on part of railroad's employees, in action for injury to switchman, who in alighting from an engine stepped on a bolt and was thrown, essential elements of. *Missouri, etc., Ry. Co. v. Jones (Tex.)*, 346.

Nonassignable Duties.

Car inspector's negligence is that of the railroad. *Erie R. Co. v. Schomer (C. C. A.)*, 303.

Objects Near Track.

Duty of railroad to fireman, through employees operating the train, to take notice of proximity of car on other track. *St. Louis, etc., R. Co. v. Phillips (Ala.)*, 792.

Instruction was erroneous in leaving to jury to determine what was "in too close proximity" to the track, and because they were not told that, if the switch stand in question was negligently placed too near or nearer than usual and customary, defendant was liable. *Southern Ry. Co. v. Lewis (Va.)*, 778.

Questions for jury as to negligence in location of mail crane causing death of engineer and whether condition of track was proximate cause of his death. *Missouri, etc., Ry. Co. v. Williams (Tex.)*, 770.

Presumption of Negligence.

Engineer killed by striking his head against mail crane near track. *Missouri, etc., Ry. Co. v. Williams (Tex.)*, 770.

On part of master does not arise from mere happening of an accident resulting in injury to an employee. *Siegel v. Detroit, etc., Ry. Co. v. (Mich.)*, 311.

Presumption that railroad was negligent, in action for injury to switchman, who in alighting from engine stepped on a bolt and was thrown, what evidence necessary to raise. *Missouri, etc., Ry. Co. v. Jones (Tex.)*, 346.

MASTER AND SERVANT—Continued.**Proximate Cause.**

Failure to warn fireman that lubricator feed glass on locomotive might sometimes break was not the proximate cause⁶ of his injury from its breaking. *St. Louis, etc., Ry. Co. v. Wells (Ark.)*, 638.

Qui facit per alium, facit per se has no application to willful acts of servants, when doctrine of. *Charleston, etc., Ry. Co. v. Devlin (S. Car.)*, 341.

Railroad is not liable for injury to brakeman, where death did not ensue, unless the negligence of its engineer causing it was gross. *Louisville & N. R. Co. v. Percy (Ky.)*, 326.

Scope of Employment.

Agents' negligence, in operating locomotives across streets for their own amusement, cause injury to third persons, liability of railroad where its. *Black v. Rock Island, etc., R. Co. (La.)*, 65.

Certain evidence did not establish agency of division superintendent so as to render service letter given to conductor discharged after collision between trains admissible as having been written within scope of his authority. *Meyers v. San Pedro, etc., R. Co. (Utah)*, 21.

Warn and Instruct.

Duty to give train signals in freight yards for benefit of railroad employees. *Ryan v. Northern Pac. Ry. Co. (Wash.)*, 71.

Duty to warn inexperienced servant of possible dangers of his employment, where experience and instruction are not necessary to enable him to do his work with safety. *St. Louis, etc., Ry. Co. v. Wells (Ark.)*, 638.

Duty to warn 17 year old boy learning position of call boy in freight yard of apparent dangers. *Ryan v. Northern Pac. Ry. Co. (Wash.)*, 71.

Who Are Employees.

Employment of minor by conductor. *Hendrickson v. Louisville & N. Ry. Co. (Ky.)*, 774.

Work Place.

Degree of care required of a master in furnishing a safe place for work does not depend on the grade of the employment, but on the character of the place and of the service to be performed. *Texas & P. Ry. Co. v. Tuck (Tex.)*, 748.

Instruction was erroneous, as leaving out of view the limitation that the master is only bound to exercise ordinary care for the safety of his servant with respect to furnishing him a safe work place. *Southern Ry. Co. v. Lewis (Va.)*, 778.

Ordinary care which a master is required to exercise to furnish a reasonably safe place to work is to be determined by the general usages of the business. *Southern Ry. Co. v. Lewis (Va.)*, 778.

Permitting grass to grow up so as to conceal rails placed near track rendered railroad liable for injuries to its section hand falling over them. *Texas & P. Ry. Co. v. Tuck (Tex.)*, 748.

Railroad is not guilty of negligence in construction of switch yard because at certain points the cars should not clear. *Peters v. Bessemer & L. E. R. Co. (Pa.)*, 316.

NEGLIGENCE.

See CARRIERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; FELLOW SERVANTS; FIRES SET

NEGLIGENCE—Continued.

BY LOCOMOTIVES; FRIGHTENING TEAMS; LICENSEES; MASTER AND SERVANT; RAILROADS IN STREETS; STATION AND DEPOTS; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS; WATER AND WATERCOURSES.

Assumption of risk is only applicable to case arising between master and servant, doctrine of: *Conrad v. Springfield Consol. Ry. Co.* (Ill.), 76.

Discovered Peril.

Doctrine of, statement of. *Chesapeake & O. Ry. Co. v. Corbin's Adm'r* (Va.), 229.

Evidence.

Inadequacy of legislation as means of preventing injury, one charged with tort resulting from violation of statute or ordinance cannot show the general. *Conrad v. Springfield Consol. Ry. Co.* (Ill.), 76.

Gross negligence, definition of. *Lexington Ry. Co. v. Johnson* (Ky.) 181.

Gross negligence is the absence of slight care. *Louisville & N. R. Co. v. Smith* (Ky.), 457.

Pleading.

Ordinance must be pleaded to be admissible in support of charge of negligence. *Dale v. Denver City Tramway Co.* (C. C. A.), 83.

Proximate Cause.

Negligence, in order to be actionable, must have proximately contributed to the injury. *Weatherly v. Nashville, etc., Ry.* (Ala.), 759.

Questions for jury. *Gould v. Merrill, etc., Co.* (Wis.), 273.

Question for jury, and when question of law, when negligence is. *Harris v. Missouri, K. & T. Ry. Co.* (Okl.), 1.

Question for jury or question of law for the court. *Patterson v. Missouri, K. & T. Ry. Co.* (Okl.), 410.

The test of negligence in the ordinary usage of the business. *Southern Ry. Co. v. Lewis* (Va.), 778.

NUISANCES.

Duty of railroads to minimize amount of smoke from their property. *Tucker v. Vicksburg, S. & P. Ry. Co.* (La.), 517.

Evidence did not show the vibration resulting from operation of roundhouse to be of such character as to interfere with any substantial right of plaintiff so as to require removal of the works of defendant. *Tucker v. Vicksburg, S. & P. Ry. Co.* (La.), 517.

Railroad will be ordered to use approved methods to minimize any annoyance to adjoining owner's from its operations. *Tucker v. Vicksburg, S. & P. Ry. Co.* (La.), 517.

Smoke, noise, and vibration caused by operation of roundhouse by defendant near plaintiff's property, right to have nuisance of abated. *Tucker v. Vicksburg, S. & P. Ry. Co.* (La.), 517.

Testimony regarding the whistling noise in question, resulting from operation of roundhouse, was not such as to make up a case requiring the interference of the court. *Tucker v. Vicksburg, S. & P. Ry. Co.* (La.), 517.

ORDINANCES.

See CROSSINGS; NEGLIGENCE

PARENT AND CHILD.

See CHILDREN.

PERSONAL INJURIES.

See DAMAGES.

Damages.

Certain instruction on the subject of the elements of damages was erroneous. *Louisville & N. R. Co. v. Percy* (Ky.), 326.

Pain and suffering, jury must be governed by the evidence in awarding damage for. *St. Louis, etc., Ry. Co. v. Dallas* (Ark.), 167.

\$12,500 was not excessive verdict for permanent personal injuries. *Louisville & N. R. Co. v. Smith* (Ky.), 457.

What Law Governs.

Liability of railroad for negligent injury is governed by law of state where injury occurred. *Weir v. Rountree* (C. C. A.), 144.

PLEADING.

See EMPLOYER'S LIABILITY ACTS; MASTER AND SERVANT; NEGLIGENCE.

POLICE OFFICERS.

See CARRIERS OF PASSENGERS.

POLICE POWER.

See CARRIERS OF LIVE STOCK.

PREACHERS.

See TICKETS AND FARES.

PROCESS.

Mere fact that person solicited freight and passenger business, routing it over the connecting line of a foreign railroad company, as he did over all other lines connecting with the companies by whom he was employed, did not make him an agent of the former company on whom process might be served under certain statute. *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.* (Wash.), 14.

Mere fact that a person was known and advertised as the "general agent" of a foreign railroad company did not make him an agent of the company upon whom process might be served, within certain statute. *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.* (Wash.), 14.

RAILROAD COMMISSIONS.

See COMMON CARRIERS.

Appeal will not lie to Supreme Court of Oklahoma to review action of Corporate Commission in requiring all railroad companies and street car companies operating within state, upon the happening of an accident, to send report thereof, both by telegraph and mail to the Corporation Commission at its office in Guthrie. *St. Louis & S. F. Ry. Co. v. State* (Okl.), 430.

Application for relief from orders of commissioners. *State v. Florida E. C. Ry. Co.* (Fla.), 423.

Authority to make and enforce rules and regulations to require the furnishing of facilities for making connections between different railroads for use and convenience of public. *State v. Florida E. C. Ry. Co.* (Fla.), 423.

RAILROAD COMMISSIONS—Continued.

Duty to obey orders of commissioners. *State v. Florida E. C. Ry. Co. (Fla.)*, 423.

Enforcement of orders of railroad commissioners. *State v. Florida E. C. Ry. Co. (Fla.)*, 423.

Order of commissioners which will operate arbitrarily, and be detrimental to public welfare, and violate constitutional rights of carrier, will not be enforced. *State v. Florida E. C. Ry. Co. (Fla.)*, 423.

Review by courts of orders of railroad commissioners. *State v. Florida E. C. Ry. Co. (Fla.)*, 423.

Review by Supreme Court of Oklahoma of action of Corporation Commission prescribing freight rates, etc. *St. Louis & S. F. Ry. Co. v. State (Okla.)*, 430.

RAILROADS.

See NUISANCES; RECEIVERS; STREET RAILWAYS; TAXATION.

Agent's negligence injuring third persons, railroad's liability on account of. *Black v. Rock Island, etc., R. Co. (La.)*, 65.

Discretion as to means and manner of operating railroad is subject to governmental supervision and regulation for certain purposes. *State v. Florida E. C. Ry. Co. (Fla.)*, 423.

RAILROADS IN STREETS.

See CROSSINGS; STREET RAILWAYS.

Mutual Rights.

Of railroad and public to use of street. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Nonassignable duties to public of railroad exercising franchise to operate steam cars on tracks crossing streets. *Black v. Rock Island, etc., R. Co. (La.)*, 64.

RECEIVERS.

Corporation, in hands of receiver appointed by federal court, is not criminally liable for the acts of the agents of the receiver, in obstructing a public road contrary to a state statute. *State v. Norfolk & S. Ry. Co. (N. Car.)*, 224.

Receivers in full charge of a railroad are indictable for the obstruction of a public road by leaving cars therein, in violation of statute. *State v. Norfolk & S. Ry. Co. (N. Car.)*, 224.

RIGHT OF WAY.

See EMINENT DOMAIN.

Grant of right of way for spur track on lands already mortgaged is subject to right of mortgagee to foreclose and sell property free from such servitude. *Louisiana & A. Ry. Co. v. Louisiana Ry. & N. Co. (La.)*, 548.

Rights of railroad company, under a grant of a right of way over land sold to pay prior mortgages, were restricted to a removal of its track from the premises. *Louisiana & A. Ry. Co. v. Louisiana Ry. N. Co. (La.)*, 548.

SLEEPING CAR COMPANIES.

See TAXATION.

STATIONS AND DEPOTS.

See CARRIERS OF PASSENGERS; LICENSEES.

Baggage room was reasonably safe, question for jury, in action for injury to passenger, whether. *Bates v. Chicago, etc., Ry. Co. (Wis.)*, 173.

STATIONS AND DEPOTS—Continued.

Constitutionality of certain penal statute requiring railroads to keep waiting rooms supplied with drinking water. *State v. St. Louis & S. F. R. Co. (Ark.)*, 443.

Contributory Negligence.

Burden of proving that injured passenger must have seen and ought to have avoided dangerous defect in baggage room was upon carrier. *Bates v. Chicago, etc., Ry. Co. (Wis.)*, 173.

Contributory negligence of person at depot to meet passenger, in attempting to pass between car on intervening track, as affected by statutory stop, look, and listen rule. *Louisville & N. R. Co. v. Smith (Ky.)*, 457.

Degree of Care.

Buildings in which property transported over its road may be securely stored, duty of carrier to provide reasonably safe. *Bates v. Chicago, etc., Ry. Co. (Wis.)*, 173.

Drinking Water.

Certain statute requiring railroads to keep waiting rooms supplied with drinking water expressly makes both the railroad and the depot agent guilty of a misdemeanor for failure to comply with it. *State v. St. Louis & S. F. R. Co. (Ark.)*, 443.

Indictment in question stated a violation of Kirby's Dig., § 6634, requiring all persons operating railroads within the state to keep waiting rooms at all times supplied with wholesome drinking water. *State v. St. Louis & S. F. R. Co. (Ark.)*, 443.

Duty to protect passengers going to and from trains from pitfalls near the pathways by lights or barriers. *Louisville & N. R. Co. v. Turner (Ky.)*, 712.

Lights.

Duty of carrier to have depot platform lighted. *Chesapeake & O. R. Co. v. Robinson (Ky.)*, 205.

Failure of carrier to provide sufficient lights at a station for passengers intending to board train tends to show actionable negligence. *Williford v. Southern Ry. Co. (S. Car.)*, 693.

Question for jury whether there was negligence in failing to properly light depot. *Bates v. Chicago, etc., Ry. Co. (Wis.)*, 173.

Platforms.

Duty to keep free from obstructions. *Missouri Pac. Ry. Co. v. Irvin (Kan.)*, 187.

Express company's act in placing dangerous obstructions upon platform, liability of railroad on account of. *Missouri Pac. Ry. Co. v. Irvin (Kan.)*, 187.

Negligence to leave express truck upon unlighted depot platform within five inches of passing passenger train. *Missouri Pac. Ry. Co. v. Irvin (Kan.)*, 187.

Signals.

Question for jury whether sufficient warning was given before closing space left for passage of persons between cars. *Louisville & N. R. Co. v. Smith (Ky.)*, 457.

Where opening in train has been made for passage of persons, the duty to give warning before closing such space is not satisfied by merely ringing engine bell or sounding its whistle. *Louisville & N. R. Co. v. Smith (Ky.)*, 457.

STOCK, INJURIES TO.

Duty of trainmen to drive away animals discovered approaching track. *Harris v. Missouri, K. & T. Ry. Co. (Okl.)*, 1.

STOCK, INJURIES TO—Continued.**Lookouts.**

Trainmen's duty. *Harris v. Missouri, K. & T. Ry. Co. (Okl.)*, 1.

Presumption of Negligence.

Rebutal of presumption of negligence arising from fact that stock is killed by an interurban electric car. *Byrd v. Central, etc., Co. (Ky.)*, 261.

Trainmen's testimony may require jury to find that the killing of stock could not have been avoided by the exercise of ordinary care. *Byrd v. Central, etc., Co. (Ky.)*, 261.

STREET RAILWAYS.

See ANIMALS; CARRIERS OF PASSENGERS; CROSSINGS; FRIGHTENING TEAMS; MALICIOUS PROSECUTION.

Actionable negligence on part of motorman was shown in action for death of city fireman in a collision between car and hose wagon. *Engvall v. Des Moines City Ry. Co. (Iowa)*, 266.

Company was not chargeable with negligence, which rendered it liable for killing passenger in automobile by collision between such a machine and car. *Dale v. Denver City Traction Co. (C. C. A.)*, 83.

Contributory Negligence.

Driver of other vehicle struck by returning car, which he had seen pass point where accident occurred. *Wilson v. Seattle, etc., Co. (Wash.)*, 80.

One who, knowing that street car was following him, suddenly turned his team and attempted to cross track in front of car, when it was about 40 feet distant, was guilty of contributory negligence. *Rouse v. Michigan United Rys. Co. (Mich.)*, 289.

Person riding on wagon by invitation of driver was not bound to inform him of dangers from street cars of which he seem to know. *Ingalls v. Lexington, etc., Ry. Co. (Mass.)*, 297.

Question for jury whether plaintiff failed to exercise due care, in action against street railway for injuries by colliding with wagon upon which plaintiff was riding by driver's invitation or consent. *Ingalls v. Lexington, etc., Ry. Co. (Mass.)*, 297.

Contributory negligence and violation of speed ordinance in running car, combined effect of. *Rouse v. Michigan United Rys. Co. (Mich.)*, 289.

Lookouts.

Motorman is not required to stop, and look up and down street he is crossing, his primary duty being to look ahead. *South, etc., Ry. Co. v. Crutcher (Ky.)*, 199.

Motorman's right to presume that if a driver is approaching track on an intersecting street he will have his team under control. *South, etc., Ry. Co. v. Crutcher (Ky.)*, 199.

Motorman was not negligent in failing to observe wagon earlier or in not stopping car. *South, etc., Ry. Co. v. Crutcher (Ky.)*, 199.

Where motorman cannot by keeping a constant lookout discover the approach of person to the track, he must also use his sense of hearing for such purpose. *Engvall v. Des Moines City Ry. Co. (Iowa)*, 266.

Mutual Rights.

Duty of traveler to give way to car and duty of motorman to have car under control. *Wilson v. Seattle, etc., Ry. Co. (Wash.)*, 80.

Negligence.

Instructions on the subject of motorman's negligence in action for

STREET RAILWAYS—Continued.

death of city fireman in a collision between car and hose wagon
Engvall v. Des Moines City Ry. Co. (Iowa), 266.

Presumption of Negligence.

Electric wires not guarded as required by ordinance, company
 prima facie liable for injuries from shock communicated from.

Conrad v. Springfield Consol. Ry. Co. (Ill.), 76.

Railway, to cross city street without municipal consent, must possess
 such charter power, though it owns the land on both sides of the
 street. *Pittsburg Rys. Co. v. City of Pittsburg (Pa.)*, 567.

Speed.

Motorman's duty to keep his car under complete control when his
 view of the street is obstructed. *Engvall v. Des Moines City Ry.*
Co. (Iowa), 266.

Violation of speed ordinance is negligence per se. *Martin v. Co-*
lumbia, etc., Co. (S. Car.), 285.

That city does not properly maintain a street for public use does not
 affect its right to prevent railway company from occupying the
 street. *Pittsburg Rys. Co. v. City of Pittsburg (Pa.)*, 567.

That lessee railroad company, under its charter, has power to cross
 city streets without municipal consent would not authorize it to
 extend the leased road over a street without such consent where
 the charter of the leased road requires such consent. *Pittsburg*
Rys. Co. v. City of Pittsburg (Pa.), 567.

TAXATION.**Exemptions.**

Consolidation of corporations, effect of. *Wright v. Georgia R. &*
B. Co. (U. S.), 525.

Incorporating railroad company with power to exercise all the
 powers and privileges conferred by an earlier act incorporating
 another railroad company does not confer upon the new cor-
 poration the immunity from taxation enjoyed by the earlier
 company under its charter. *Wright v. Georgia R. & B. Co. (U.*
S.), 525.

Meaning of "and after that" in duration clause of statute. *Wright*
v. Georgia R. & B. Co. (U. S.), 525.

"Stock" in exemption provision of statute, what included within
 the term. *Wright v. Georgia R. & B. Co. (U. S.)*, 525.

Tax upon franchise of railroad impairs obligation of charter ex-
 emptions from any property tax other than one based on its net
 profits. *Wright v. Georgia R. & B. Co. (U. S.)*, 525.

Foreign corporation as a "person" entitled to be protected by the
 equal protection of the laws clause of U. S. Const., 14 Amend.
 against the imposition of a certain additional franchise tax.
Southern Ry. Co. v. Greene (U. S.), 539.

Foreign sleeping car company cannot be required to pay the "char-
 ter fee" of a given per cent of its entire capital stock, imposed by
 Kan. Gen. Stat. 1901, p. 280, as a condition of doing business, as
 such requirement amounts to burden on company's interstate
 business, and on its property located and used outside of state.
The Pullman Co. v. State of Kansas (U. S.), 128.

TICKETS AND FARES.**Fares.**

Permission to minister of gospel to travel at lower rate than that
 given to general public, right of carrier to withhold. *Illinois*
Cent. R. Co. v. Dunnigan (Miss.), 166.

TRESPASSERS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; LICENSEES.

Degree of Care.

Care due one who was technically a trespasser on car because of her ignorance of rule requiring passenger to enter car through certain door. *Yancy v. Boston Elev. Ry. Co. (Mass.)*, 705.

Due trespasser on railroad right of way. *Weatherly v. Nashville, etc., Ry. (Ala.)*, 759.

Railroad owes nothing to trespasser but to avoid injuring him after his discovery on track. *Southern Ry. Co. v. Stewart (Ala.)*, 234.

VICE PRINCIPALS.

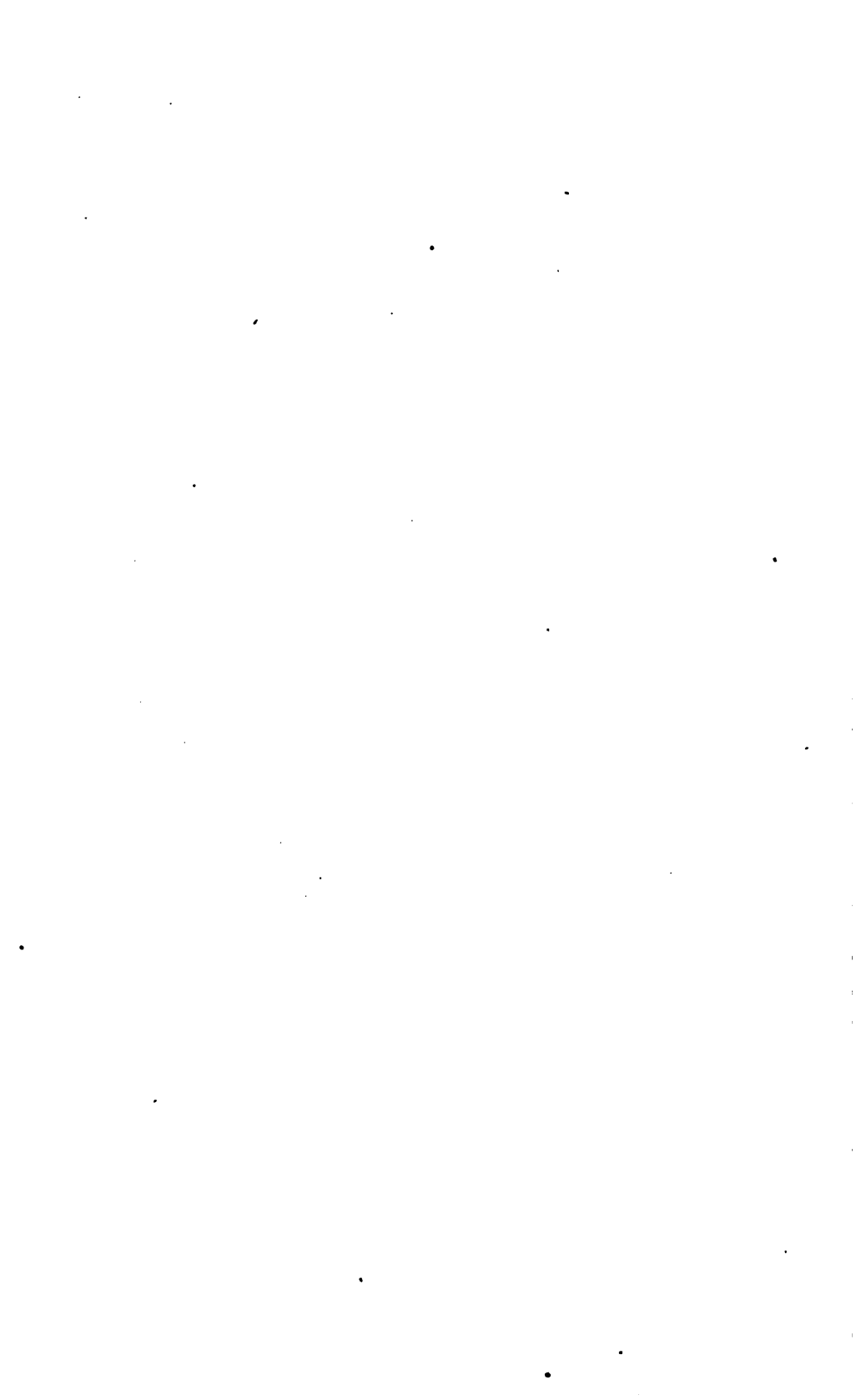
See EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; WATER AND WATERCOURSES.

Act of God in sending unprecedented rains was no defense where act of railroad causing surface water to overflow lands of another was unlawful. *Southern Ry. Co. v. Lewis (Ala.)*, 778.

Surface water to overflow lands of another, liability for causing. *Southern Ry. Co. v. Lewis (Ala.)*, 743.









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